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A TREATISE
ON THE
AMERICAN LAW OF ADMINISTRATION.

VOL. I.

A TREATISE
ON THE
AMERICAN LAW OF GUARDIANSHIP
OF MINORS AND PERSONS OF
UNSOUND MIND.

By J. G. WOERNER.

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A
TREATISE
ON THE
AMERICAN LAW OF ADMINISTRATION.

BY
J. G. WOERNER,
AUTHOR OF "AMERICAN LAW OF GUARDIANSHIP."

SECOND EDITION.

IN TWO VOLUMES.

VOL. I.

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By J. G. WOERNER

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PREFACE TO THE SECOND EDITION.

IN submitting to the public the second edition of the "American Law of Administration," the editors take this opportunity to acknowledge their grateful appreciation of the many kind expressions of approval from the bench and bar which the work has received, and of the encouraging welcome accorded to it.

This edition is the product solely of the personal labors of the editors during the last ten years, particularly of the junior editor, who, it may be added, took an important part in the preparation of the first edition, and was thoroughly familiar with the work from its inception.

It has been their constant object in this,—as it was in the complementary volume on the "American Law of Guardianship," recently published by the same author, and which really is included in the term Administration and forms part thereof in its most comprehensive sense,—to present to an American bar, from an American standpoint, a practical and comprehensive treatment of a subject that is becoming emphatically more and more the development of our own peculiar institutions, and to which the English works upon the subject are every year becoming less applicable and more unsatisfactory.

In adapting the present edition to the changes wrought by ten years of development in this live subject, some alterations have been made and a few portions rewritten. Besides which the constant use of the book in their own practice has enabled the editors to detect some defects and remedy the same in this edition. A number of articles on practical subjects in administration matters occurring in the active practice of the profession have been added, or much enlarged upon, and will, we hope, prove a welcome feature.

▼

PREFACE.

Great care has been taken in collating the authorities. It is safe to say that every decision on our subject, officially reported in the interim since the first publication, has been carefully examined, involving an enormous amount of labor and of time, and from amongst them all, nearly 5000 new cases have been selected with painstaking discrimination and added to the work. The statutes referred to have also been sedulously compared and brought down to the time of the revision. We are confident that the law of administration is given as it stood in this country at the time of sending the copy to the printer.

The index, which has necessarily been remodelled, has been prepared with great care, and it is hoped will furnish a ready key to the contents of the book.

The editors submit their labor to the consideration of a kind public, trusting that it may meet with the same leniency of criticism that was extended to the first edition.

St. Louis, Mo.,
March, 1899.

J. G. WOERNER.
WM. F. WOERNER.

PREFACE TO THE FIRST EDITION.

THE present treatise originated in the endeavor to qualify myself for the office of judge of probate, now more than eighteen years ago. The study of the statutes was found insufficient. Questions often arose in practice to which they afforded no adequate solution. Obscure provisions of uncertain application, as well as the omission to provide for some cases of daily occurrence, not altogether remedied by interpretation and construction on the part of courts of last resort, made it necessary to seek light elsewhere. Text-books by American authors, furnishing valuable help certainly, served, on the other hand, to create new perplexity by the widely differing constructions therein shown to be put on statutes of similar import in different States, even by courts of the same State on the same statute, and by the unreconciled difference in the standpoints from which the several courts deduced the principles governing them in their decisions. Recourse to English books presented a new difficulty: while to the English practitioner the grand works of Jarman on Wills and of Williams on Executors and Administrators, constituting a masterly and thorough exposition of the law governing estates of deceased persons, furnish a readily accessible and safe guide, they are of assistance to the American practitioner only in so far as he is conversant with the departure from the common in the modern English law, as well as with the changes wrought in the common law by American statutes, usage, and policy. Reliance upon them without continually remembering the bearing of these changes is dangerously misleading, and may be looked upon as accounting, in a large measure, for the vacillation and inconsistency so often complained of as characterizing the decisions

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of American courts. Late American editions of these works by men of more than national reputation for learning and ability, enriched by valuable and instructive editorial notes and comprehensive citations of American cases up to the time of publication, have accomplished much in the way of guarding against this danger, and still constitute the most reliable books of reference to American judges and practitioners, at least in all cases determined by the common law, unaffected by English or American statutes. Their influence is plainly discernible in the briefs and arguments of counsel and the opinions of courts, although not always expressly acknowledged,—not always, indeed, perceived by them. But the heterogeneity between text and notes is bewildering to any but a very careful observer, thoroughly familiar with the spirit at least and the general outline of the American law on the subject. The very excellence of these treatises—the close sequence of reasoning and symmetry of arrangement which place them so high as authority—serves to emphasize the incongruity between the English text and the American notes, by increasing the difficulty of applying the former to the essentially different conditions presented by American theory and practice.

In prosecuting these studies I was impressed with the force of the thought, so obvious when once suggested, that, as the statutes cannot be fully understood without the knowledge and presupposition of the common law, constituting at once the substratum upon which they rest and a not inconsiderable element in the enactments themselves, so the nature and extent of the transformation brought about in the common law by engrafting upon it principles of American growth become clearly apparent only when considered in the light of the underlying principles,—the *raison d'être* of the English as well as of the American law. Thus, in searching for the reason of the distinction existing in both countries, though not in both to the same extent, between courts intrusted with testamentary jurisdiction and those of general or plenary powers, we are led to see that it lies deeper than the historical one at the surface,—the recognition of secular authority in ecclesiastical tribunals, which Blackstone characterizes as a “peculiarity” of the British constitution, which earlier

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English writers looked upon as an encroachment by the Church, and which common law courts jealously resented. The origin of distinct courts with probate powers in America cannot, certainly, be ascribed to such a cause, since ecclesiastical tribunals never possessed secular powers in this country. The reason is found in the nature of property, which requires for its control, after the owner's death, tribunals with functions different from those of courts adjusting property rights between litigants *sui juris*. Again, it is well known that the common law is shaped in many particulars by the feudal principles introduced by the Conqueror, while in America, at least since the Revolution, the feudal tenure has never been recognized, and feudal theories are therefore inapplicable here. It is obvious, then, that property means quite a different thing at common law, as modelled on feudal principles, from property in the sense of modern statutes, whether English or American, and that the construction of such a statute from the common law point of view would be liable to lead to error and inconsistency.

In the following pages the attempt has been made to present the American Law of Administration as it appears when expounded in the light of the causes which called it into being, and contrasted with its background of common law traced to the condition of things from which *it* originated. In the Introduction will be found a brief examination of the nature of property, the principle of its devolution on the owner's death, and the officers and tribunals necessary to accomplish the devolution. The body of the work constitutes the amplification in detail of the principles deduced from the nature of property and the logical functions of courts. The common law as well as the statutes, the decisions of courts as well as the rules which govern their procedure, not omitting the reasoning and announcements of text writers, have all, so far as my ability allowed, been considered in the light thrown upon them by tracing them, as effects, to their causes. For the law, which Coke demands to be the perfection of human reason, cannot be arbitrary or capricious in its requirements, and must therefore reflect some actual, real condition, which, when discovered, makes apparent its purpose. Since the law is necessarily

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administered in the light of antecedent adjudications,—every decision by a competent court of last resort constituting thenceforth the law of the land, as much as the statute which it construes,—the treatise necessarily deals with the law as so announced. To give it value to practitioners, it must refer them to the source of the law, whether a statute, the common law, or adjudication by a court of binding authority. Hence the numerous citations of text-books, statutes, and decided cases, which yet constitute a small proportion of the innumerable authorities which might be cited. In the selection made I was guided somewhat by my own experience, and received valuable assistance from my son, whose fresh vigor and practical acquaintance with the views and wants of the bar served to clear up doubts on many controverted topics. In some few instances I did not hesitate to announce my own views on points upon which I could not see the logic of preponderating authorities, but was careful, in every such case, to quote the arguments from which I dissented. English cases are referred to only where American cases in point have not been found, or to throw light on points upon which the latter disagree.

I offer the result of my labors to my brethren of the bench and bar, mistrusting that their uniform courtesy and kindness to me personally may have unduly emboldened me to the venture; bespeaking for the work that indulgence and leniency of judgment which I feel to be its chief passport to public favor. But, I may add, I was sustained in the laborious task of many years by the hope that it might, to some slight extent, lessen the wearying work of over-burdened judges, assist the busy lawyer in finding the authorities decisive of a case under examination, and furnish to some of my brother probate judges suggestions not entirely without value.

J. G. W.

ST. LOUIS, Mo.,
March, 1889.

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A TREATISE

ON THE

AMERICAN LAW OF ADMINISTRATION.

INTRODUCTION.

OF THE NATURE OF PROPERTY AND THE PRINCIPLE DETERMINING ITS DEVOLUTION.

CHAPTER I.

OF PROPERTY IN GENERAL.¹

§ 1. **The Acquisition of Property.**—My property is that which is *mine*. That only is mine which I *acquire, hold, and dispose of* by my will. It is *my will* which determines the acquisition of a thing by me, whether originally, by reducing to possession, and thus *making my property* that which [* 2] which * was no one's property before; or *by contract*, by which a thing becomes mine through the *concurrence* of my will with

Property is the realized will of its owner.

¹ The definition of property has been attempted upon various theories. An able writer, Mr. U. M. Rose, has published, in the "Southern Law Review" (N. S., vol. ii. p. 1 *et seq.*), a series of articles, entitled "Controversies of Modern Continental Jurists," in which he comments upon the most celebrated theories concerning the derivation of rights, and dwells with approbation upon Kant's System, which he styles *the Possibility of Coexistence* (as to Kant's definition of property, see his *Rechtslehre*, published in the *Philosophische Bibliothek*, vol. xxix., Berlin, 1870), and Rosmini's theory, from whose work (*Della Natura del Diritto*, Naples, 1837) he quotes to some extent.

The reader will notice how near these views approach those given in the text, which follow the exposition of Hegel in his *Philosophie des Rechts*, §§ 40-70. No translation into the English tongue of this truly exhaustive and masterly treatise on the law has, as yet, it is believed, appeared; but in "The Journal of Speculative Philosophy" (vol. iv. p. 155) was published the "Outlines of the Science of Rights, Morals, and Religion," which is a translation of Hegel's *Philosophische Propädeutik*, enriched by explanatory notes, elucidating Hegel's terminology and abstruse reasoning, and which contains a full synopsis of his greater work.

that of its former owner. Since I cannot rightfully acquire the property of another without his consent, — that is, without his free will, — it is obvious that the will of the original owner is a necessary element in my ownership, and in the ownership of any one who may lawfully acquire it after me, and remains operative until the property has lost its character as such by voluntary abandonment. By my own free will I may abandon my property, whereupon it ceases to be such, and relapses into the condition of *res nullius*, — subject to become property by the sole will of any person who acquires it.

§ 2. **Tenure and Use of Property; its Loss by Non-user.** — I hold or use a thing which is mine, at will. Matter is unfree, — i. e.

It is so only so long as its owner wills it to be so. it has no will, it does not belong to itself. Neither right nor duty can be predicated of a mere thing; its quality is to offer resistance; it is, therefore, negative to

my will: my will, in realizing itself, overcomes this resistance and subjects the thing to its purposes, — changing its form, destroying, consuming it. That which is *mine* is thus a part of *my personality*, of *me*, in so far as its end and purpose of existence is the satisfaction, the realization of my will, and to serve it for its purposes as my bodily limbs serve me. Will, then, is the essence of property; without it there is none. Hence, that from which I have withdrawn my will, which I have abandoned, ceases to be my property, and becomes, as we have seen, *res nullius*, the appropriation of which by another is no violation of my right, because it is no collision with my will. If, then, I wish to preserve my property, or, which is the same in effect, my right to it, I must indicate, in some way perceptible to others, that it is still subject to my will; otherwise I may be understood as having abandoned it. To avoid collisions arising out of a misinterpretation of my relation to a thing, a definite period is fixed

It ceases to be the property of him who ceases to will it to be his. by custom or law, within which my will is presumed to attach to it; if I permit this period to expire without using the thing, or indicating in some tangible way that it continues to be mine (keeping it in possession, laying it up, or in some way exercising ownership over it), its abandonment is presumed, and my right to it is lost by *prescription*, my ownership barred by *limitation*.

*§ 3. **Alienability of Property.** — In like manner I may *relin-* [* 3] *quish* my property to another, either by freely *giving* it, or *ex-*

Or wills it to be some one's else. *changing* it for other property. We have already seen that property acquired from another can become such only by the will of the former owner. My donee as well

as my vendee holds the property given or sold by the concurrence of my will with his own; it must be my will that the donee shall take, and his that he will receive, the thing which he acquires from me by gift; and my will to relinquish and that the vendee shall hold the property I sell or barter, and his to relinquish and that I shall hold

the property I get in exchange therefor. Property so relinquished does not cease to be property when it ceases to be mine, for it is *my will* that my donee or vendee shall hold it. The alienation of property constitutes one of the forms in which I use it, in which it serves my purposes, and in which I *realize my will*. This phase or quality of property constitutes the sphere of *contract*. Alienability is of the essence of property; an infringement of my right or power to alienate my property is therefore a limitation upon my free will, and to that extent a violation of my personal liberty, because my free will finds realization in property. The infraction of my personal freedom is precisely the same if a limitation is put upon my power to alienate property as if I were prevented from acquiring, or from holding or using it. The limitation would in either case deprive me of my power to contract, and thus destroy my liberty.¹

Alienation is one of the uses to which property may be put by its owner.

§ 4. *Operation of the Owner's Will after his Death.* — Property, then, is the realization of the free will of a person, the external [* 4] *sphere of his freedom. As such, it partakes of, and is clothed with, the dignity and inviolability of the person. The things which constitute property can have no rights, for they have no will; and will alone, or the person in which it has its *abode and vehicle*, can be the subject of right and of its correlative, duty. The law recognizes and deals with property only in so far as it recognizes and deals with the will of the owner, realized or externalized therein. For the sphere of the law is the Spiritual; it operates upon and through the will alone.² Thus the law recognizes in the property of a deceased person his free will; that is, his rational will, and enforces it. The fail-

The law recognizes in property the will or right of its owner.

¹ Intellectual or manual skill, sciences, arts, even religious functions (sermons, masses, prayers, etc.), as well as services to be rendered for another at or for a given period, are all included in the sphere of contract. It might appear, on a superficial view, that such skill, or functions, or services, cannot be classed as *things*, and do not therefore constitute property, being themselves emanations of free will, and qualities or attributes of the mind. But it is within the province of my mind or will to *externalize* a limited share of my activity, to give to another an interest in it, and thus to reduce it to the condition of an external thing, which I may alienate for his use; — not the whole of my labor, skill, or services, — the totality of my activity or productions, — for that would be to alienate my own personality, to destroy my free will,

which are inalienable. The servant or laborer for hire *realizes his will* by exchanging his services or productions for his wages, and thus enters into a lawful contract; but the slave gives up or is deprived of his free will, to the *destruction of his personality*, which can neither be relinquished nor acquired as property by another. Hegel, *Philosophie des Rechts*, §§ 43, 66, 67, and *addenda*.

² The will is free; freedom is its substance and essential quality, in like manner as the substance and essential quality of matter is gravity. Gravity is not an accidental predicate of matter, but matter itself; so with freedom and will: freedom is will. Will without freedom is a word void of meaning; freedom exists only as will. Hegel's *Philosophie des Rechts*, § 4, and *addendum*.

ure of such recognition would destroy the property, which can be such only through the will of its owner. If this has been adequately expressed, the disposition of the property is enforced accordingly; if not, the law itself supplies the omission by imparting to the property the universal will, which is the free will of rational persons.

§ 5. **Distinction between Rational and Capricious Will.** — The distinction between truly free or rational will and caprice, unfree or But cancels irrational will, lies in the content which the will gives mere caprice. itself, or the object which it pursues. Universal will (as distinguished from personal, individual, or subjective will) is the will as embodied in the law, in morality, ethics, religion. Without universal will there could be no laws, nor anything obligatory upon us all. Each one would act according to his own caprice or pleasure, without respecting the caprice or pleasure of others. In so far, then, as the will of the individual has for its content or object the universal will, it is rational and free.¹ Caprice, arbitrary or limited will, has for its object or content the gratification of some impulse or appetite, which may or may not be rational, i. e. in consonance with the universal or absolute will.² It follows that the law can recognize and enforce only *true or rational will, and must [*5] ignore and cancel that which is capricious and arbitrary.

§ 6. **Relation of Property to the Family.** — The ethical relation between the sexes demands their union in matrimony, from which Right of the family to property. *the family* results as a spontaneous natural (social union) *society*, whose members are united by the bonds of mutual affection, implicit trust, and voluntary obedience (*pietas*). The family is an organic totality, whose constituent elements have their true existence not in their individuality, but in their relation to each other through the totality, lacking independence when separated from it; they have no separate interests to seek, but only one common interest for the whole. Hence, there dwells in the family but one will; namely, that of the head of the family, who

¹ "The absolute will has only itself for object, while the relative will has something limited": Hegel, *Propädeutik*, § 20; *Jour. Sp. Ph.*, vol. iv. p. 57. See also Hegel, *Encyclopädie*, §§ 483-486.

² Caprice (arbitrariness) is *formal*, but not *true* freedom. Since I may elect to determine, or not to determine, this or that, I possess what is ordinarily called freedom. My choice consists in the faculty of the will to make this or the other thing *mine*. Being a particular content, this thing is not adequate to me: I am not identical with it; I am simply the potentiality to make it mine. Hence, the

choice lies in the indeterminateness of the Ego and the determinateness of the content; being determined (limited) by this content, the will is not free — i. e. has not itself (universal will) for its content. Whether the content (object) of the capricious will be rational (conforming to the universal will) or not, depends upon *accident*: my dependence upon the content constitutes the inconsistency of caprice. Men usually believe themselves free when allowed to act arbitrarily, but true freedom has no contingent content; it alone is not contingent. Hegel, *Phil. d. R.*, § 15; *Jour. Sp. Ph.*, iv. 50-58.

represents it in its legal relations to others.¹ In recognizing the true nature and validity of the family, the law accords to it and secures it in the enjoyment of the necessary means to its existence, property; and this in a higher sense and in a more efficient degree than it secures the property of individuals. The existence of the family as an aggregate person requires a permanent estate, adequate not only to the capricious purposes and desires of an individual, but to the common collective wants of all its members.² In this estate or property no one member of the family has an exclusive interest or right of possession, but each his undivided interest in the common fund.³ Nevertheless, the property is usually held by the head of the family, and in his name. It devolves chiefly upon him to provide for it the means of subsistence and of satisfying their various [* 6] wants. He controls, manages, and disposes of the property * or estate, limited in his absolute dominion over it, aside from his moral obligations, only by the affirmative provisions of the law. Upon the dissolution of the family through the development of its ethical purpose, i. e. upon the attainment of majority of the children, — who then separate from it as persons *sui juris*, capable of holding property of their own and becoming founders of new families, — their interest in the family estate is modified accordingly; the authority of the father, as well as his liability to support such children, is no longer recognized in law, but becomes of ethical or moral force only.⁴

§ 7. **Testamentary Disposition of Property.** — From the nature of property, in its relation to the individual as well as to the family, springs the principle of its devolution upon the death of the owner. The power to dispose of property by *last will* or *testament* results strictly from its essential *quality of alienability* by the owner,⁵ and is, like gifts or contracts *inter vivos*, limited only by the policy of the law.⁶ The restraint placed

Testamentary power springs from the right of alienation.

¹ 3 Jour. Sp. Phil., p. 167, § 23.

² Hence the provisions in the statutes of the several States securing to the widow and orphans of a deceased person the homestead, year's support, etc., as against creditors; the homestead acts, liability of a father for the support and education of his minor children, the wife's right to dower, etc.

³ Hegel, Phil. d. R., §§ 158, 170; Encycl., § 520.

⁴ Hegel, Phil. d. R., § 177.

⁵ See *ante*, § 3.

⁶ But, from the standpoint of ethics and morality, the unlimited testatory power is not justifiable. If the testator die after his children have reached majority, there may be some ground for volun-

tary discrimination between his natural heirs. Unless, however, this is resorted to in a very limited measure, and for valid reasons it will be in violation of the logical and ethical basis of the family. Nor can the testatory power be deduced from the arbitrary will of the testator against the substantial rights of the family unless the kinship be remote. The arbitrary power of the father to disinherit his children is one of the immoral provisions of the Roman laws, according to which he might also kill or sell his son; and the wife (even if not in the relation of a slave to her husband, *in manum conveniret, in mancipio esset*, but as a matron) was a member, not of the family of which she was the mother, but of that of which she

upon a testator is no greater than that which exists in cases of alienation of property *inter vivos*; * the wife's dower, the provisions, clothing, year's support, household furniture, etc., of

which a testator cannot deprive his family, are similarly protected against creditors, and, in many cases, against improvident alienation by the living head of the family.

A fruitful source of litigation is found in the capricious and arbitrary dispositions often made in wills, to the grievance and unjust deprivation of heirs at law; and the readiness with which juries seize upon slight pretexts, flimsy proof of "undue influence," etc., to set aside such unjust wills, is indicative of a deep-seated ethical aversion to the power of arbitrarily diverting the natural channel of the devolution of property.

§ 8. **Succession of Property at Law.** — Upon the natural dissolution of the family by the death of the parents, or more particularly of the husband or father, the property of the family *descends* to the heirs. It is quite apparent that, in the case of a family in the most restricted, natural sense (consisting of parents and children), there is in this process no substantial, but only a formal change of ownership: the property held by them in common, or by the head of the family for them,¹ now passes to them directly. In the absence of a testamentary division, the property vests by the law of descent, passing from the husband and father to the wife and children, that being the natural, substantial, and rational course; such, in the absence of a contrary disposition, is the rational, substantial will of the deceased to which the law gives effect. In default of wife and children, the parents, brothers and sisters, or other more distant relatives, constitute the heirs; the family bond is looser as the kinship is more remote and the relatives belong to other families of their own. In the same ratio in which the reason demanding the heirship between members of the same family loses force with the remoteness of kinship, the propriety and

was a descendant, inheriting from the latter, and the latter inheriting from her. Hegel, *Phil. d. R.*, §§ 179, 180.

The power of testamentary disposition of property is nowhere so unlimited as under the modern statutes of England and the American States. The common law of England, at least the custom in particular places, did not allow a man to dispose of the whole of his personal estate by will unless he died without either wife or issue, but required him to leave one third to his wife and one third to his children, if he left both wife and children; or one half to his wife or children if he left either. (See 1 *Perk. Williams on Exec.*,

1 *et seq.*) Under the codes of Louisiana and most of the continental countries of Europe, the right to disinherit one's own children is allowed only for certain causes pointed out by the law, which are required to be recited in the instrument, the truth of which may be traversed and the will set aside if not sustained at the trial. Blackstone is eloquent in the expression of his disapprobation of "the power of wantonly disinheriting the heir by will, and transferring the estate, through the dotage or caprice of the ancestor, from those of his blood to utter strangers": 2 *Bla. Comm.* 373.

¹ See *ante*, § 6.

justice of testamentary disposition of property becomes more apparent.¹ The disposition of property in anticipation of death [* 8] * (*donatio mortis causa*) is but another form of testamentary disposition.²

§ 9. **The Law as the Rational Will of the Owner.** — It is self-evident that the claims of creditors of a deceased person constitute a title to the property left by him superior to that of heirs, whether testamentary or at law. A debt constitutes property of the creditor remaining in the possession of the debtor, which, by the concurrent will of both, is, at some period subsequent to the creation of the debt (arising out of an express or implied contract), to pass into the possession of the creditor. The debtor, then, has only a qualified property in the thing (usually the price for goods sold or services rendered) which constitutes the debt; namely, the right of *possession* for a period of time which may be definite, or depend upon the forbearance of the creditor. The substantial property — the right to the thing, with a present or future right to the possession also — is already in the creditor; for this reason, it cannot go to the debtor's heirs, or it goes to them to the extent only in which he had an interest therein. To secure the rights of creditors in the estates of deceased persons against the heirs as well as against strangers, and to secure justice to and between the heirs themselves, — in other words, to enforce the rational will of the decedent, which can be no other than that upon his death his property shall pass to his creditors and testamentary or legal heirs, — the law itself performs the office of the deceased owner, substituting for or supplying as his will its own universal will.³

The law accomplishes what the deceased himself would have done.

¹ The institution of primogeniture is deducible from the political necessity of the State, which seeks to increase its stability by creating a class of persons independent alike of the favor of the government and of the public at large, and protected even against their own imprudence and caprice by the entail of their estates, relieving them from the distracting cares of obtaining the means of support, and from the vicissitudes of fortune, thus enabling them to devote their undivided energies to the service of the State. Primogeniture and entail are violative of the true principle of property, destroying both its alienability and natural course of descent; hence, they are utterly indefensible and immoral, where no political necessity exists for them. (Hegel, *Phil. d. R.*, §§ 306, 180.) In America they are

generally inhibited by the constitutions or statutes of the several States.

² See *post*, ch. vii.

³ "The character of *this estate*, together with the variety of individuals who may be interested in it, as creditors, legatees, or distributees, seems to demand that it also should be *vested by law* in some common agent, who shall preserve it from waste, and dispose of it to those entitled to receive it according to the provisions of that law which has undertaken to provide for the discharge of the duties omitted by the intestate. The creation of this *agent* the law wisely leaves to the discretion of the ancestor, if he chooses to exercise it: he may make his own will instead of leaving it to the *law* to make one for him, and he may appoint his own agent or executor instead of confiding

* From this theory it is apparent that the true reason of the [* 9] law of descent, of the recognition of the validity of testaments,

The nature of property and rights of the family determine the course of descent.

and of the authority assumed by the law over the estates of deceased persons, is to be found in the necessity of restoring the essential quality of property which has lost the will element by the death of the owner. Some text-writers look upon the property left by deceased persons as *res nullius*, which might be seized and appropriated by the first comer or bystander, and hold that the laws of descent and of distribution are simply wise and necessary precautionary measures to prevent strife and violence at the death-bed. That such is the effect of these laws is evident enough, as also their wisdom and validity; but to place the reason of their enactment on this ground is to ignore the true nature of the family, as well as the true nature of property.¹

§ 10. Administration: Functions of Executors and Administrators.

— The purpose of the law in this respect is accomplished in a simple and efficient manner by its officers or ministers, vested with powers and duties commensurate with the exigencies requiring their intervention. The sum of their activity is called *administration*, which, in its narrowest legal sense, is the collection, management, and distribution, under legal authority, of the estate of an intestate by an officer known as *administrator*; or of the estate of a testator having no competent executor, by an *administrator with the will annexed*. The person charged with the management and disposition of the estate of a testator, is an *executor*, and his office is called *executorship*, because he executes the testator's will, but his official acts are also called *administration*.² The functions of these officers are in many respects similar to those of trustees as * known in chancery. Text- [* 10] writers find it convenient to subsume them under the same class

this duty to the probate court under the authority of the law. If the ancestor, by will, appoint his own agent or executor, he thereby becomes vested with the title to the property in a fiduciary character. But if, either designedly or otherwise, the ancestor die without executing his power of testamentary disposition, the law, as in case of real estate, assumes itself the duty of appointment, and vests this title and authority over the *personal estate* in a common agent for the parties in interest, who is called an *administrator*." — Harris, J., delivering the dissenting opinion in *Evans v. Fisher*, 40 Miss. 643, 679, *et seq.*, citing from 1 Tuck. Lect., pt. 2, pp. 397, 398.

¹ Hegel, Phil. d. R., § 178.

² The term *administration*, in its primary signification and general sense equivalent to *conduct, management, distribution*, etc. (Webster), is also applicable to the management of the estates of minors, persons of unsound mind, drunkards, spendthrifts, etc., by officers known as *guardians, curators, tutors, committees*, etc. Persons who are incompetent to manage their affairs have not free will, without which, as previously set forth in the text, there can be no property; hence, as in the case of deceased persons, the law vindicates its character as such by supplying it with the content of its own universal will, through the intervention of guardians, etc.

when discussing the powers, rights, duties, and liabilities of trustees. But there is an obvious and essential distinction between administrators and ordinary trustees: while the latter derive their powers from the voluntary creators of the trust, the authority of the former flows directly from the law itself. Their functions constitute an essential element of the law, and are exercised with entire independence of the personal views, desires, and intentions of the parties concerned. They are in the full sense officers of the law, and of courts organized and having jurisdiction for the especial purpose of aiding and controlling them.¹ They are clothed with authority to act in all matters connected with the disposition of the decedent's estate precisely as he himself would rationally have done; and it is the office of these courts to compel such action, and to cancel all capricious, wilful acts inconsistent with justice and the legal rights of creditors and distributees.

§ 11. Functions of Courts controlling the Devolution of Property.

—The organization of courts having exclusive jurisdiction over matters pertaining to the administration of the estates of deceased persons, and of minors and persons incapable of managing their affairs, has undoubtedly proved exceedingly useful and convenient to the public. But while to this circumstance may be ascribed their historical development and the modern growth and increased extent of their jurisdiction, yet the true distinction between them and the courts of ordinary plenary jurisdiction is not found in their usefulness or convenience, but is based upon the more profound principle underlying their origin, the logical diremption of the functions peculiar to the two classes of courts, which a brief examination of these functions will readily disclose.²

Controlled by a class of courts organized for this purpose.

The division of the powers of government into their constituent elements results, in all modern free states, in the three co-ordinate departments, confided to separate magistracies, known as the legislative, judicial, and executive. It is sufficient for the present purpose to bear in mind that it is the office of the judiciary to interpret and apply the law established by the legislative branch to cases arising out of collision, whether actual or imaginary, with the law, leaving it

to the executive branch to carry out the judgments of the [* 11] courts. Thus the judge is seen to act as the *organ or mouth-piece of the law, announcing, in each case brought to his official cognizance, whether the alleged collision between the will of an individual, as objectified in an outward act (for will which is undetermined, not become external by accomplishment of its purpose,

¹ That administrators are officers of the court see: *Raugh v. Weis*, 138 Ind. 42, 45; *Byers v. McAuley*, 149 U. S. 608.

² The functions of courts in respect of

the property of minors and persons of unsound mind are discussed in *Woerner on Guardianship*, §§ 1-3.

is beyond the realm of the law, which deals only with the actual¹), is real or imaginary. In the exercise of this function, the judge, with a directness peculiar to this branch of sovereign power, accomplishes the great office and end of the state and of all government, the accomplishment of justice, the realization of will: securing to the rational will of the individual its legitimate fruition, and holding the irrational, capricious, or negative will to its own logical result (reparation and punishment for wrong and crime).

But we have seen that all property subject to administration is deficient in that element which alone can be the basis of a *collision* between the individual will and the law; it is the province of the court having jurisdiction over executors and administrators *to supply the individual will* lacking in property, to fill the vacuum created by the death of the owner with the content of the universal will; that is, to secure the disposition of property under administration as the owner, acting rationally, would have disposed of it if living. The functions involved in this office² have a ministerial element super-added to their judicial quality, which, if they occurred in ordinary courts of law or equity, would require the intervention of adjuncts — commissioners, auditors, referees, etc. — involving, aside from the question of inconvenience, delay, and cost, an incongruity in the duties of the office.³

Such being the logical basis and scope of courts having control of executors and administrators, their historical development in England, but more particularly in the United States, has been a gradual but steady separation from the common law and chancery courts, and has resulted in a practical recognition of probate jurisdiction as a distinct and independent branch of the law, destined to achieve for itself a sphere *sui generis*, based upon and determined by its own inherent principles.

¹ Hegel, Phil. d. R., §§ 113, 13.

² Such as the appointment of administrators, granting probate of wills in non-contentious cases, qualifying executors, fixing the amount and passing upon the sufficiency of bonds and sureties, receiv-

ing inventories, settlements, reports, etc., fixing the dividends to be paid to creditors, decreeing payment of legacies, ordering distribution of the residue, etc.

³ Jurisdiction of Probate Courts: South. L. R. (N. S.), vol. iii. pp. 254-267.

[* 12]

* CHAPTER II.

OF THE DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY.

§ 12. **Distinction between Movable and Immovable, or Real and Personal Property.**—All property, of whatever kind or division, is necessarily determined, in its devolution upon the death of the owner, by the same immanent law or principle. There is no inherent difference in this respect between corporeal and incorporeal, or between movable and immovable property; all alike passes according to the will of the deceased owner, whether expressed by himself or presumed by the law. But the difference existing between movable and immovable property, with respect to the feasibility of its actual transfer or delivery from person to person, and from place to place, gives rise to important distinctions to be observed, both as regards the formalities necessary to constitute a valid testamentary disposition, and as to the code of law which may govern the descent. It will appear, from the consideration of the subject hereafter,¹ that immovable property must be determined by the law of the place where it is situated; but that movables generally descend according to the law of the owner's last domicil.

All property descends according to the owner's will.

But real and personal property may pass under different rules.

The most important classification of property, giving rise to far-reaching and radical distinctions at the common law and in most of the States, is its division into *real* and *personal*,² corresponding substantially, but not precisely, to immovable and movable property, or to lands and tenements on the one side, and goods and chattels on the other. The importance of this division grows out of, or is at least enhanced by, the introduction of the feudal system

The distinction arises out of the feudal system.

into England after the Conquest, which put an end to all absolute ownership in land, and thus

did violence to the principle upon which property rests. The feudal system has so thoroughly permeated the common law, and so thoroughly given it form and color, that neither this nor the statutory systems of England or America can be understood without a

¹ *Post*, § 168.

² The terms "real" and "personal" seem to owe their origin to the nature of the remedies applicable for the deprivation of either of these classes of property: the action for land is a *real* action,

because it is directed against the thing itself, — the *real* thing; that for goods and chattels is *personal*, because the proceeding is against the *person* only: *Rap. & L. Law D.*, 1066.

knowledge of, and continual reference to, the feudal principles. A brief outline of the origin and history of the tenure by which land was and now is held in England must therefore precede the further consideration of the subject.

§ 13. **Origin of the Tenure of Real Estate at Common Law.** — The peculiarity of the feudal system consists in the division of the ownership: under it the property in, as well as dominion over, all lands in England was originally in the king, who granted out their use on condition of certain services to be performed. This holding, or *tenure*, was not limited to the first or paramount lord and his vassals, but extended to all to whom such vassals parted out their feuds to their own vassals, thus becoming *mesne* lords between the latter and the lord paramount.¹ It became a fundamental maxim and necessary principle (though in reality, says Blackstone, a mere fiction) “that the king is the universal lord and original proprietor of all the lands in the kingdom; and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services.”² Gratuitous as were these feuds at their first introduction, so they were precarious, depending upon the will of the lord, who was the sole judge whether his vassal performed his services faithfully. Then they became certain for one or more *years*, and later they began to be granted for the *life* of the feudatory; until in process of time it became unusual, and was therefore thought hard, to reject the heir, if capable of performing the services. The heir, when admitted to the feud of his ancestor, used to pay a fine for the renewal, which continued to be exacted upon the death of the tenant even after feuds became absolutely hereditary.³

The ancient English tenures are described by Bracton (in the time of Henry III.) as of four kinds, which he calls knight service, free socage, pure villenage, and villein socage, all of them being upon condition of services, duties, and burdens more or less * op- [* 14] pressive;⁴ but they were swept away, in the course of time, with all their heavy appendages,⁵ and all tenures in general (except frank-almoign, grand serjeanty, and copyhold) reduced to one general species of tenure called *free and common socage*, by which all freehold lands in England are held to this day.⁶

§ 14. Substantial Abrogation of the Feudal Tenure by English

¹ 1 Washb. on Real Property, bk. 1, ch. 2, pl. 11.

² 2 Bla. Comm. 51.

³ 2 Bla. Comm. 54 *et seq.*

⁴ 2 Bla. Comm. 61 *et seq.*

⁵ By stat. 12 Car. II. c. 24, pl. 1, 2; “a statute,” says Blackstone, “which was a greater acquisition to the civil property of this kingdom than even Magna

Charta itself; since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigor; but the statute of King Charles extirpated the whole and demolished both root and branches”: 2 Bla. Comm. 77.

⁶ 1 Washb. on R. P., bk. 1, ch. 2, pl. 42; 2 Bla. Comm. 79.

Statutes. — It is readily seen that the *tenure* of the feudatory, under the strictly feudal principle, was not *property* in the true sense; for we have seen that an essential attribute of property is its alienability,¹ and the feudal tenant could neither convey his right to another during his lifetime, nor transmit it to heirs or devisees after his death. The tenure was enlarged in the course of time; the power to alienate,² to transmit, first by descent, and finally by devise,³ was accorded to the tenant, so that at the present time there is but little practical difference between the absolute ownership enjoyed by the American landholder and the tenure by free and common socage now prevalent in England.⁴ But this enlargement of the tenant's rights cannot be looked upon as the fruit of the logical development of the feudal tenure; it is rather a departure from it, an abandonment of its principles, imperatively demanded by the change in the relations between the lord and the vassal, — a change which in the course of time has swept away every condition supporting the feudal system. In so far as lands are now recognized, in England, as property, whose owners enjoy all the rights and consequences involved in absolute ownership, the feudal tenure has been abolished in reality, though the name and the forms which it entailed upon the common law have survived.

[* 15] * § 15. **The Devolution of Real Property to the Heir or Devisee, and of Personal Property to the Administrator or Executor.** — The common law of England took form and growth under the influences of the feudal system in its original vigor: feudal principles constitute one of its essential features, and determine wholly its policy in respect of real estate. Whatever rights of ownership are now enjoyed by English landholders have been granted by acts of Parliament, in derogation of the common law as well as in conflict with feudal principles.⁵ Since at common law no English subject could hold land allodially, or in absolute ownership, but held it upon condition of rendering services and duties (some of them being military, hence excluding from a genuine feud all infants, women, and professed monks, as incapable of bearing arms), and under purely voluntary grant (*dedi et concessi*), from the feudal lord, it follows that feudal grants could not be taken for the debts of the tenant, either before or after his death, nor devolve by succession upon his heir or devisee. Nor had the personal representative

Tenure of lands under English statutes.

Feudal grants conditioned upon service of the vassal; grant (*dedi et concessi*), not liable for the tenant's debts;

¹ *Ante*, §§ 3, 7.

² In the year 1285, by the statute of 13 Edw. I., called the Statute of Merchants, it was provided that the goods and lands of the debtor shall be delivered to the creditor, if the debt be not discharged; and in 1290 the statute known as "Quia emptoris terrarum," 18 Edw. I.

c. 1, removed all restrictions upon the alienation of the lands of freemen.

³ By statute of 32 Henry VIII. c. 1, followed by the explanatory statute of 34 & 35 Henry VIII. c. 5.

⁴ 2 Bla. Comm. 78, 79.

⁵ *Ante*, § 14.

and reverted
to the lord on
tenant's death.

Heirs took
by renewed
grant.

Statute abol-
ishing feudal
service

confirmed title
of the heir,
but gave no
claim to
creditors.

Statutes sub-
jecting land
to payment
of debts.

of a deceased feudal tenant the slightest claim to or interest in the fee held by the decedent, for the fee reverted to the lord; neither creditors nor next of kin were entitled thereto, and if it passed to the heir it was not by *descent* or in right of the ancestor, but by a renewed grant from the lord.¹ Feuds became hereditary, and the unconditional descent of lands from the ancestor to the heir was secured by a statute which abolished the court of wards and liveries, of wardships, liveries, primer seisins, ousterlemains, values and forfeitures of marriage, fines for alienation, and tenures by homage, knight service, and escuage.² This statute operated as a confirmation of title in the heir, but creditors were not allowed to subject lands in the hands of heirs to the satisfaction of their claims against the ancestor; consequently executors and administrators, whose principal function it is to pay creditors out of the estate left by decedents, had no interest in or duties with reference to such lands. The law subsequently gave recognition to the rights of creditors in a series of statutes, culminating in 3 & 4 William IV. c. 104, which makes

* real estate of a deceased person liable for simple [* 16]

contract debts, as well as for specialties. Thus, by a number of statutes, the tenure of English landholders was made equal, in every practical respect, to absolute ownership, investing the tenant with all the rights, and subjecting him to all the duties, of allodial owners; while the common law, in its forms of procedure, in the nature of the remedies and defences accorded to litigants, and in the principles governing its technical construction, is feudal in its theory.

This dual nature of the English law sometimes produces antagonism between its content and its form, and thus violates in its provisions the strict requirements of logic; a notable instance of which may be found in the rule that the legal ownership of personal property descends to the executor or administrator, but that of real property to the devisee or heir. The rule arose out of the feudal tenure of lands, which could not, as above shown, go to the personal representative, because neither the creditors nor the heirs had any right thereto. The gradual conversion of this tenure into an ownership possessing all the essential qualities of property except the name removed the foundation and reason of the rule; but the rule remained, — a form void of essence, a body from which the soul has fled.

It is very important, for the purpose of ascertaining the scope and meaning of the numerous rules, statutory enactments, and judicial decisions bearing upon the distinction between real and personal property, to keep continually in mind that they are traceable to a

¹ *Ante*, § 13.

² Stat. 12 Car. II. c. 24.

condition of things no longer existing in England, and which never had existence in America.

§ 16. **Incongruity of the Rule in America.** — The common-law distinction between real and personal property is still recognized in most of the American States, and with it the doctrine t at real property descends to the devisee or heir, and personal property to the executor or administrator. This doctrine was received along with the common law

Mischief produced by the recognition of the common-law rule.

of which it forms a part. Its incongruity, more conspicuous in a country in which feudalism had never obtained foothold, together with the attempts made in many of the States to abolish or modify the rule as inconsistent with the true theory of property, has produced much confusion and inconsistency in the decisions [* 17] of the courts of the several States touching the law of * real estate of deceased persons. The common law, as well as the statutes of England enacted before the settlement of the Colonies, is not only the basis upon which the new States built up their own systems, but was enacted as law in almost every State,¹ introducing, save as against affirmative legislative modification, the feudal principles which it embodies. These principles are so interwoven with common-law jurisprudence that to remove them would destroy the whole texture.² It seems to be so difficult, indeed, entirely to eliminate from our codes those rules and doctrines which constitute an essential element of the common law, but which grew out of conditions utterly different from our own, that but few legislatures have undertaken the task of building up a purely American system; and what efforts are made by legislatures in this direction are often thwarted by the conservative spirit of lawyers and judges, in construing American statutes from the standpoint of the common law. In some of the States, however, the distinction between personal and real property, as affecting the course of its descent, has been entirely abolished,³ and in most of them the common-law rule more or less modified. These attempts to adapt the common law to the condition of things in America, in which the legislative and judicial authorities of each State proceed according to their own views of the policy demanded for the interest of its citizens, either retaining the common law, or modifying it to a greater or less extent, or cutting loose from it entirely, have resulted in a bewildering labyrinth of conflicting decisions, not only among the several States, but in the States themselves.⁴

¹ Except Louisiana.

² Tilghman, C. J., in *Lyle v. Richards*, 9 Serg. & R. 322, 333. It is held in this case that the common-law doctrine of forfeiture, for the purpose of barring con-

tingent remainders, has been extended to Pennsylvania.

³ See *post*, § 337.

⁴ The diversity of the American law on this point, and on the scope of the

jurisdiction of probate courts and the conclusiveness of their judgment (see, on this point, *post*, §§ 143 *et seq.*), is not only the source of distressing uncertainty and anxiety to administrators and their legal advisers, but a positive injury to creditors and distributees, in its mischievous tendency to destroy faith in the validity of the title to property which executors and administrators find it necessary to

sell in winding up the estates under their charge. See, on this point, the remarks of the Hon. John F. Dillon in his address before the Alabama Bar Association, 22 Am. L. Rev. 30, 37, entitled "A Century of American Law;" and of the Hon. David Dudley Field before a reunion of the Yale Kent Club at New Haven, entitled "Improvements in the Law," to be found in 22 Am. L. Rev. 57, 61.

TITLE FIRST.*OF THE DEVOLUTION OF PROPERTY ON THE
DEATH OF ITS OWNER.**

PART FIRST.**OF THE DEVOLUTION AS DETERMINED BY THE ACT
OF THE OWNER.**

BOOK FIRST.**OF TESTAMENTARY DISPOSITION OF PROPERTY.**

THE scope of the present treatise forbids an exhaustive disquisition on the Law of Wills and Testaments ; nor is there any need for such an undertaking, the whole ground being amply covered by the able and thorough work of Jarman, the fifth American edition of which contains references to the latest American decisions relating to the subject up to the time of its publication, with explanatory comments by the American editor.¹ But it is unavoidable to refer to the principles upon which the law is based, and to incorporate into the present work some of the details bearing upon testamentary capacity, the form, execution, attestation, revocation, and probate of wills, as well as, at the appropriate time, to point out the principal rules of construction, and the principles upon which the will is carried into effect.

¹ "A Treatise on Wills, by Thomas M. Bigelow, Ph. D., of the Boston Bar. Jarman, Esq. The Fifth American from Little, Brown, & Co., 1881." the Fourth English Edition. By Melville

* CHAPTER III. [* 19]

OF THE EXTERNAL LIMITS PLACED UPON TESTAMENTARY CAPACITY.

§ 17. **Limitation of the Property disposable by Will.**—It may be proper, in the first place, to consider what part of a man's property is subject to his testamentary disposition. In this particular the practical development of the English law is not in strict harmony with the logical notion of property, which seems to demand a restriction of the power within narrower limits than are placed upon it in either England or America. Contrary to the progress of testamentary law in Rome and on the European continent, which proceeded from practically unlimited power of disposition (Law of the Twelve Tables) to a limitation thereof (*Lex Falcidia*), the legislation of England has constantly enlarged the powers of testators in this respect,¹ until now, both in England and America, the right to dispose of property by will is as broad and comprehensive as the right of disposition while living.²

Without inquiring into the distinctions as to the various kinds of property which may be devised or bequeathed, and whether property acquired by the testator after the time of executing his will passes thereby,³ it is necessary to remember, in this connection, the various provisions existing at common law and enacted by the several States in favor of the widow and surviving minor children, as limitations upon the testator's power over his property. These subjects will be treated hereafter in connection with the subjects of dower,⁴ support of the family,⁵ and homestead.⁶

In Louisiana, whose code of laws retains many of the principles of the civil law, the testator's power to disinherit his children and * father or mother is limited to cases enumerated by [* 20] the statute, and based upon their own misconduct, the par-

¹ " . . . Glanvil will inform us, that, by the common law, as it stood in the reign of Henry II., a man's goods were to be divided into three equal parts, of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal. . . . This continued to be the law of the land at the time of *Magna Charta*, . . . and Sir Henry Finch lays it down expressly in

the reign of Charles I. to be the general law of the land." 2 Bla. Comm. 491.

² *Ross v. Duncan*, Freem. Ch. 587, 598, *et seq.*

³ This subject will be treated in a subsequent part of this work. See *post*, § 419; also § 53.

⁴ *Post*, § 105 *et seq.*

⁵ *Post*, § 77.

⁶ *Post*, § 64.

ticulars of which must be alleged in the will ;¹ and the other heirs of the testator are, moreover, obliged to prove the facts on which the disinheritance is founded, otherwise it is null ;² nor can a testator, if he leaves a legitimate child, dispose of more than two-thirds of his property, nor of more than one-half if he leaves two, nor of more than one-third if he leaves three or more legitimate children ;³ nor of more than two-thirds, if he leaves no children, but a father, or mother, or both.⁴

Disinheritance of children in Louisiana.

§ 18. **Limitations upon Testamentary Capacity.** — We have seen that the power of testamentary disposition is an essential element in the nature of property,⁵ because the right to hold property includes the right to alienate it in such manner as the owner may, in the exercise of his free will, determine.⁶ It follows from this, that every person may make testamentary disposition of his property who is capable, with reference thereto, of exercising free will.⁷ But this definition of testamentary capacity, although perhaps strictly accurate in the abstract, is too general and vague to serve as a sufficient rule of law. To enable judges and juries to act with the certainty and uniformity required for the purposes of justice in ascertaining the validity of testamentary dispositions, particular rules are established by legislative enactment and judicial authority, by means of which the law is rendered positive and certain, so far as human intelligence can make it. These particular, positive rules of law, themselves established to carry out the fundamental principle, operate as a limitation upon the discretionary scope of judges and juries ; without which the line of division between testamentary capacity and incapacity would necessarily be fixed by each person acting in a judicial character, now here, now there, according to the personal impression of the moment, producing upon the community rather the effect of a misleading *ignis futuus*, than serving as a light to guide them in the knowledge of the law.

What is testamentary capacity.

Rules necessary to determine testamentary capacity.

[* 21] *In the nature of things such rules must be negative in form, because they operate as limitations, — particularizing, defining the general law, as exhaustively stated in the general formula, Every person capable of exercising free will may make a valid testamentary disposition of his property. The first step will therefore be to state the proposition

Such rules are negative in form.

¹ Voorhies' Rev. Civ. C. 1888, arts. 1617–1624.

² Ib., art. 1624.

³ Ib., art. 1493.

⁴ Ib., art. 1494.

⁵ *Ante*, § 7.

⁶ *Ante*, § 3.

⁷ Hence, in most States, all persons having attained the age of majority, or

of twenty-one years, not under legal disability, are competent to dispose of their property by will. So in Delaware, Indiana, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, and Vermont. See *post*, § 20, p. * 25, notes 3 and 4.

itself in its negative form : No person is capable of exercising testamentary power who is, for any reason, incapable of exercising free will ; from which the classification of testamentary incapacity, or of persons incapable of making wills because they lack testamentary capacity, naturally arises. Manifold are the distinctions drawn, in the numerous books which treat of this subject, as to the sources of testamentary incapacity ;¹ it will be sufficient, however, for the purposes of this work, to observe the distinction between external limitations upon the will, or disabilities created by the law in furtherance of public policy, and incapacity arising from an immanent defect of the mind by reason of which the person is devoid of the reasoning power and firmness of intellect necessary to realize his own will.

To the former belong the legal presumption of want of discretion arising from infancy, the merger of a married woman's personality in that of her husband, the incapacity of an alien to devise lands, etc.

* To the latter may be referred idiocy, lunacy, delirium, or [* 22] any condition of weakness or unsoundness of mind by reason of which a person's acts or conduct are not attributable to his own free will.

§ 19. **Incapacity of Aliens.**—The testamentary incapacity of aliens does not extend to personal property ;² and the invalidity of the devise of real estate by them arises out of their incapacity to hold real estate. Considerations of public policy require that no alien, whether friend or enemy,

Incapacity of aliens extends to real property only.
¹ Godolphin, in his "Orphan's Legacy : or a Testamentary Abridgment," reckons five classes of persons incapable of making testaments : "1. Such as are by Law prohibited for want of *Discretion* ; as Children, Mad or Lunatick Persons, Idiots, Old Persons grown Childish through excess of Age, and Persons Actually Drunk. 2. For want of Freedom or Liberty, or that are not *Sui juris* in all respects ; as Villains, Captives, and Women Covert. 3. For want of some of their principal Senses ; as Deaf, and Dumb, and Blind. 4. Such as are Criminous ; as Traytors, Felons, wilful *Felo's de se*, and the like. 5. Such as are prohibited by reason of some certain Legal Impediments ; as outlawed Persons, Persons at the very Point of Death, Alien Enemies, and such others." This classification, however, does not seem to satisfy him, for he is careful to add : "But here note, That all the said Persons are not in all

Cases absolutely and utterly Intestable, but in some certain Cases only, as will more distinctly appear hereafter." — God. on Wills, ch. vii.

Williams, the most accurate and logical, and at the same time most careful and diligent, and therefore thoroughly reliable author on Testamentary Law, distinguishes between what he calls "three grounds of incapacity : 1. the want of sufficient legal discretion ; 2. the want of liberty or free will ; 3. the criminal conduct of the party" : Wms. on Ex. [12] ; to which he adds, as not strictly subsumable under any one of these heads, the cases of aliens and of the reigning sovereign. This division seems better to accord with the ancient learning on the subject, than with strict logic.

² *Greenia v. Greenia*, 14 Mo. 526, 528, approved in *Harney v. Donohoe*, 97 Mo. 141, 144 ; *Evan's Appeal*, 51 Conn. 435, 439.

shall have title to lands as against the sovereignty;¹ but an alien may take land by purchase or devise, and hold the title subject to the right of the sovereignty to procure an escheat or forfeiture upon information and office found.² Until the land is so seized, or the alien owner in some way dispossessed, he has complete dominion over the same, and may convey it to a purchaser;³ but upon the alien's death, although he leaves heirs who would be capable of taking if he were a citizen, the land escheats.⁴ This is the rule at common law, according to which aliens cannot take real estate by descent, or by operation of law in any respect.⁵ A change took place during the second half of the century, both in England and in America, in the direction of obliterating the distinction between citizens and aliens in the ownership of property. Most of the States enabled alien friends to acquire lands by purchase, devise, or descent, and to hold, alien, devise, and transmit the same by descent;⁶ unconditionally, as in Alabama,⁷ Arkansas,⁸ Colorado,⁹ Florida,¹⁰ Georgia,¹¹ Maine,¹² Maryland,¹³ Massachusetts,¹⁴ Michigan,¹⁵ Missouri,¹⁶ Nevada,¹⁷ New Jersey,¹⁸ North Carolina,¹⁹ North Dakota,²⁰

Tendency to obliterate distinction between citizens and aliens.

Aliens hold lands same as citizens.

¹ *Commonwealth v. Martin*, 5 Munf. 117, 119.

² *Fairfax v. Hunter*, 7 Cr. 603, 619, *et seq.*; *Fox v. Southack*, 12 Mass. 143, 146; per Dykman, J., in *Maynard v. Maynard*, 36 Hun, 227, 229; *Peckham, J.*, in *Re McGraw*, 111 N. Y. 66, 96. See *post*, on the subject of Escheats, §§ 131 *et seq.*

³ *Sheaffe v. O'Neil*, 1 Mass. 256; *McCreery v. Allender*, 4 H. & McH. 409, 412; *Marshall v. Conrad*, 5 Call, 364, 402; *Scanlan v. Wright*, 13 Pick. 523, 529; *Ramires v. Kent*, 2 Cal. 558, 560.

⁴ See *post*, §§ 131 *et seq.*; *Slater v. Nason*, 15 Pick. 345, 349; *Mooers v. White*, 6 Johns. Ch. 360, 365; *Rubeck v. Gardner*, 7 Watts; 455, 458; *Maynard v. Maynard*, 36 Hun, 227, 230.

⁵ In other words, they may take by act of a party, but not by operation of law: *Swayne, J.*, in *Hauenstein v. Lynham*, 100 U. S. 483, 484; *Montgomery v. Dorion*, 7 N. H. 475, 480; *Blight v. Rochester*, 7 Wheat. 535, 544; *Dawson v. Godfrey*, 4 Cra. 321, 322; *People v. Conklin*, 2 Hill (N. Y.), 67, 69; *Geoffrey v. Riggs*, 18 Dist. Col. 331, 334; s. c. 133 U. S. 258; *Wunderle v. Wunderle*, 144 Ill. 40, 64, and cases cited; *Utassy v. Giedinghagen*, 132 Mo. 53, 60.

⁶ *Howard v. Moot*, 64 N. Y. 262, 270; *Lumb v. Jenkins*, 100 Mass. 527; *Doe v.*

Robertson, 11 Wheat. 332, 357; *Billings v. Hauver*, 65 Cal. 593; *Kilfoy v. Powers*, 3 Dem. (N. Y.) 198.

⁷ Code, 1886, § 1914; *Nicrosi v. Phillipi*, 91 Ala. 299, 307.

⁸ Dig. of St. 1894, § 247.

⁹ *McConville v. Howell*, 17 Fed. R. 104. It is held in this case, following *State v. Rogers*, 13 Cal. 159, that the constitution is not a grant of power, but a limitation on the general legislative power; and that the right given to resident aliens may be enlarged, but cannot be abridged by the legislature.

¹⁰ Rev. St. 1892, § 1816.

¹¹ Code, 1882, § 1661: Alien friends "shall have the privilege of purchasing, holding, and conveying real estate."

¹² Rev. St. 1883, p. 604, § 2; p. 539, § 14.

¹³ Publ. Gen. L. 1888.

¹⁴ Pub. St. 1882, p. 744, § 1.

¹⁵ How. St. 1882, § 5775.

¹⁶ Rev. St. 1889, § 342. See *Utassy v. Giedinghagen*, 132 Mo. 53, 59.

¹⁷ Laws, 1879, p. 51; Gen. St. 1885, § 2655. An exception is made in this State against subjects of the Chinese Empire; but see *State v. Preble*, 18 Nev. 251.

¹⁸ Gen. St. N. J. 1895, p. 23, § 3.

¹⁹ Code, 1883, § 7.

²⁰ Rev. Code, 1895, § 3277.

Ohio,¹ Oregon,² Rhode Island,³ South Carolina,⁴ Tennessee,⁵ Virginia,⁶ Wisconsin,⁷ and West Virginia;⁸ or upon condition of *bona fide* residence in the State or United States or appearance by the heir

Or upon condition of residence, etc.

or devisee within a time limited by statute, during which the claimant may become a citizen, or sell the land before it escheats to the State, as substantially

provided in Arizona,⁹ California,¹⁰ Connecticut,¹¹ Idaho,¹² Indiana,¹³ Kentucky,¹⁴ Montana,¹⁵ New Hampshire,¹⁶ New York,¹⁷ and Pennsylvania.¹⁸ The Naturalization Act accomplishes the same result in England.¹⁹ It may be mentioned in connection with this subject, that both the English and most of the American statutes provide

Alienage of ancestors no defect of title.

that alienage in any grantor or ancestor through whom title to real estate is claimed, shall constitute no defect in such title.²⁰ But in recent years a counter current

Restrictive tendency in recent years.

seems to have set in, notably in the new Western States, indicating a disposition on the part of legislators to restrict, rather than to enlarge, the capacity of aliens to hold

real estate in this country. Thus aliens are inhibited from acquiring any interest in agricultural, arid, or range lands in excess of 2000 acres in Colorado;²¹ while in Illinois²² and Iowa²³ non-resident aliens are

¹ Rev. St. 1890, § 4173.

² Code, 1887, § 2988.

³ Pub. St. 1882, p. 442, § 6.

⁴ Rev. St. 1894, § 1981.

⁵ Code, 1884, §§ 2804 *et seq.*

⁶ Rev. St. 1887, § 43.

⁷ Ann. St. 1889, § 2260.

⁸ Code, 1887, ch. 70, §§ 1, 2.

⁹ Rev. St. 1887, § 1472.

¹⁰ Five years is allowed in this State, after which the land escheats: Civ. Code, §§ 671, 672; *State v. Smith*, 70 Cal. 153. Proceeding to escheat within five years after intestate's death is premature: *People v. Roach*, 76 Cal. 294.

¹¹ Gen. St. 1887, § 15; see *Campbell's Appeal*, 64 Conn. 277. Exception is made in this State in favor of French citizens, who are classed with resident aliens, and may purchase, hold, inherit, and transmit real estate as fully as native citizens, so long as France accords the same right to American citizens. Non-resident aliens may hold and transmit real estate used for mining purposes: *Ib.*, § 16.

¹² Five years: Rev. St. 1887, § 5715.

²³ In this State most of the distinctions between citizens and non-resident aliens had been abolished in 1868: *Furenes v. Mickelson*, 86 Iowa, 508, 510. In 1888

¹³ Ann. St. 1894, §§ 3328, 3331, 3333; but see also, § 3389, authorizing all natural persons who are aliens, whether resident or not, to hold property in same manner as citizens.

¹⁴ Eight years from final settlement: *Ky. St. 1894*, §§ 334, 338.

¹⁵ Comp. St. 1888, p. 400, § 553.

¹⁶ Pub. St. 1891, p. 378, § 16.

¹⁷ *Stamm v. Bostwick*, 122 N. Y. 48; *Branagh v. Smith*, 46 Fed. Rep. 517.

¹⁸ Aliens take by devise or descent, liable to be sequestered during a war with his State or prince; resident alien friends take by purchase, but not exceeding 500 acres until he becomes a citizen; non-resident foreigners may acquire land by purchase not exceeding 5000 acres: *Bright. Purd. Dig.* p. 84, §§ 1, 3, 6.

¹⁹ 33 Vict. c. 14, § 2.

²⁰ See *post*, § 76, on the subject of Descent to Aliens.

²¹ Rev. St. 1891, § 100.

²² *Wunderle v. Wunderle*, 144 Ill. 40, 50; *Beavan v. Went*, 155 Ill. 594. The amendment of 1891 to the statute (providing that where a deed to land has been

non-resident aliens were prohibited from acquiring title to any real estate, except that widows and heirs of naturalized citizens and of aliens who had acquired title

incapable of acquiring title to or holding any lands or real estate by descent, devise, or purchase. In Kansas, the constitutional provision that "No distinction shall ever be made between citizens and aliens in reference to the purchase, enjoyment, or descent of property" was changed in 1888, so as to inhibit any distinction between "citizens of the State of Kansas and the citizens of other States and Territories of the United States" in this respect, and the right to legislate thereon expressly conferred upon the legislature;¹ and in 1891 the rights of non-resident aliens and foreign corporations were largely cut down, but heirs of aliens theretofore acquiring lands had three years to hold and dispose of them.² In Minnesota,³ Mississippi,⁴ and Missouri⁵ non-citizens, or persons who have not declared their intention to become citizens, cannot acquire, hold, or own real estate except (in Mississippi and Missouri) it be acquired by devise or inheritance, or in any of these States, in due course of justice in collecting a debt. In Nebraska non-resident aliens cannot acquire title to, or take or hold any real estate by devise, descent, or purchase; but may take a lien and purchase under a sale for a debt due them, and sell it within ten years.⁶ In Texas aliens may acquire lands by purchase, devise, or descent, defeasible only at the instance of the State;⁷ a statute passed in 1891, limiting the time within which aliens could hold lands by devise or descent to six years was held unconstitutional because not properly entitled.⁸

Though the title of aliens to lands within the limits of the several States of the Union is matter of State

Treaties control State legislation

made to an alien, the alien shall have power to convey to a citizen of the United States a good title thereto or encumber the same in favor of a citizen, if the conveyance or encumbrance be made before legal proceedings are taken to seize such land in behalf of the State) applies only to alien males who have declared an intention to become citizens and to alien females actually resident in the State: *De Graff v. Went*, 164 Ill. 485, 489. But in 1897 the statute of 1887 was repealed and a new law respecting aliens enacted providing *inter alia* for the holding of realty for six

years to enable the alien to sell, and thereafter by a sale by the State, etc.: *Laws* 1897, p. 5 *et seq.*

¹ *Buffington v. Grosvenor*, 46 Kans. 730.

² *St.* 1897, ch. 51, § 1. If under 21 five years were given.

³ *Gen. St.* 1891, § 3996.

⁴ *Ann. Code*, 1892, § 2439.

⁵ *Laws*, 1895, p. 207; amended in *Laws*, 1897, p. 144.

⁶ *Con. St.* 1893, §§ 4396 *et seq.*

⁷ *Gray v. Kaufmann*, 82 Tex. 65, 67.

⁸ *Gunter v. Texas Co.*, 82 Tex. 496.

before may hold such lands by devise or descent for ten years, after which, unless the alien heirs have sold such lands, or become citizens, they escheat: *Laws*, 1888, ch. 85, § 1. It is held, under this statute, that a naturalized citizen cannot inherit through a father, who is a non-resident alien, the lands of a great-uncle, who was a naturalized citizen: *Furenes v. Mickelson*, *supra*. It is also held that the non-

resident heirs of a non-resident may hold inherited lands for ten years: *Easton v. Huott*, 95 Iowa, 473. A non-resident alien could under this statute acquire by purchase if within five years the same was placed in the actual possession of certain relatives, but not by descent: *Burrow v. Burrow*, 98 Iowa, 400. See *Laws*, 1894, Ch. 82; also *Opel v. Shoup*, 100 Iowa, 407.

on the ownership of lands by aliens. regulation, yet the treaty-making power of the United States includes the regulation of the transfer, devise, and inheritance of property in this country owned by citizens of a foreign country; hence a treaty between the United States and a foreign nation will control or suspend the statutes of the individual States when there is a difference between them.¹

§ 20. **Incapacity of Infants.** — The incapacity of infants arises necessarily out of their want of discretion. But the gradations of

Incapacity of infants, disability affected by age and sex.

mental capacity are impossible of accurate measurement; and, since it is impracticable to ascertain the precise moment when an infant's mind is sufficiently matured

to act rationally upon the ordinary affairs of * life, [* 24] the law fixes a definite age before the attainment of which it

conclusively presumes the want of discretion. It is evident that, whatever age may be fixed upon, there will be many whose mind is riper and better able to understand the nature of human transactions before they reach it than that of others who have passed this age. The limitation, therefore, is an external one, based not so much upon

mental incapacity, but arising out of a legal disability. The necessity of classing infancy with external limitations upon testamentary

power is apparent also from the diversity of the rules laid down with regard thereto in the several codes. For at common law

Common-law rule. male infants of fourteen, and female infants of twelve

years of age, were held competent to make wills in regard to their personal estate.² This rule was abolished in England

Abolished by English statute. by statute,³ in 1838, which allows no valid will by any

person under the age of twenty-one years, whether of personal or real property; but in many of the American States the common-law distinction is still observed. In Florida⁴

Rules observed in American States. and South Carolina the statute fixes the age of twenty-one years as necessary to devise real estate, but is silent

as to personal property. In Tennessee⁵ no age qualification is mentioned for either real or personal property; hence the common law remains unchanged in each of these three States. In New York⁶ males of eighteen and females of sixteen, in Georgia⁷ infants of fourteen

¹ *Wunderle v. Wunderle*, 144 Ill. 40, 54; *Hauenstein v. Lynham*, 100 U. S. 483; *Opel v. Shoup*, 100 Iowa, 407 (treaty with Bavaria); *Adams v. Akerlund*, 168 Ill. 632 (holding that subjects of Sweden could hold realty in the U. S.); *Doehrel v. Hillmer*, 102 Iowa (treaty with Prussia), 169, 171.

² The rule is not so much that of the common law, which seems to fix the age of seventeen years as the period of testamentary capacity, but introduced into England by the ecclesiastical courts,

which there had exclusive jurisdiction over the probate of wills of personalty, and is traceable to the civil law. See *Smallwood v. Brickhouse*, 2 Mod. 315; *Hyde v. Hyde*, Prec. Ch. 316; *Arnold v. Earle*, 2 Lee Eccl. R. 529, 531.

³ 1 Vict. c. 26, amended by 15 & 16 Vict. c. 24.

⁴ *Meyer v. Meyer*, 7 Fla. 292, 294.

⁵ *Moore v. Steele*, 10 Humph. 562, 565; *Campbell v. Browder*, 7 Lea, 240.

⁶ *Banks & Bro.* (9th ed.) p. 1876, § 21.

⁷ *O'Byrne v. Feely*, 61 Ga. 77, 85.

and in Colorado of seventeen years of age, and in Maryland parties "when competent to contract and make deed," may bequeath personal property. In a number of States the age required of either sex is twenty-one to devise real, and eighteen to bequeath personal property;¹ in others, the age of twenty-one for males and [* 25] eighteen for females is fixed as necessary to will * either real or personal property.² In Missouri males may will personal property at eighteen, but must be twenty-one to devise real estate, while females may will either personal or real estate at eighteen. In several States wills of realty as well as of personalty may be made by either sex at eighteen;³ in Wisconsin the marriage of a female, and in Arizona and Texas the marriage of a male or female, enables such person to dispose of real or personal property by will before reaching the age of majority. But by far the greater number of States require a testator of either sex to be of full age,⁴ or of the age of twenty-one years,⁵ to dispose of either real or personal property by will.

The appointment of testamentary guardians, as authorized by the Statute of 12 Car. II., is in many States expressly conferred on infant fathers.⁶

A rule of computing time should be noticed in connection with the question of infancy and majority, which is a departure from the ordinary rule. At common law, in computing the age of a person for testamentary purposes, the day of his birth is included. As the law does not recognize frac- Computing
time of ma-
jority. tions of a day, but directs both the day of the birth and of the anniversary to be reckoned as full days, it results that a person born on the first day of January, 1880, in the last hour of that day, will attain majority on the first instant of the thirty-first day of December, 1900, — nearly two days less than twenty-one years.⁷ The rule is recognized in several American States.⁸

¹ In Alabama, Arkansas, Oregon, Rhode Island, Virginia, and West Virginia. In Arkansas the real and personal property of a married female is made her separate property by the Constitution, and may be devised as if she were a *feme sole*. Const., art. xii. § 6.

² In Illinois, Iowa, Kansas.

³ In California, Connecticut, Nevada, Montana, North Dakota, South Dakota, Utah.

⁴ Arizona, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, Ohio, Vermont, Washington.

⁵ Delaware, Indiana, Kentucky, Maine, Mississippi, New Hampshire, North Carolina, Oregon, Pennsylvania.

⁶ Woerner on Guardianship, § 20, p. 56.

⁷ 1 Jarm. on Wills, * 45. Judge Redfield cites Swinburn, Blackstone, Kent, Bingham, and Metcalf as so laying down the rule, and takes occasion to express his emphatic dissent therefrom, deeming it "scarcely less than a blunder, which, for the good sense of the thing," he wished to see set right. 1 Redf. on Wills, 20 *et seq.* But in some States the method of computation is fixed by statute: see Woerner on Guardianship, § 6, p. 17.

⁸ State v. Clarke, 3 Harr. (Del.) 557, 558; Hamlin v. Stevenson, 4 Dana, 597; Wells v. Wells, 6 Ind. 447.

§ 21. **Incapacity of Married Women.**—The disability attaching to married women to dispose of their property by last will is peculiar to the English law. It arises out of the fiction at common law, that coverture merges the personal existence of the wife in that of the husband; it is said that a married woman has no legal existence apart from her husband.¹ This rule was not changed in England by the several statutes concerning wills; ² but in the Married Women's Property * Act [* 26] of 1882 ³ married women are enabled to hold and dispose of "by will or otherwise" any real or personal property, in the same manner as if they were *femes sole*; since which time wills of married women are entitled to general probate, including all property disposed of in the will.⁴ Exceptions are mentioned in English cases, according to which married women may, even at common law, make valid wills; but it will be noticed that the term "exceptions" is scarcely applicable, as the circumstances under which the power is recognized are not strictly subsumable under the rule.

The first of these exceptions is, that a married woman may will her personal property with the consent of her husband.⁵ But since at common law the personal property of the wife is absolutely that of the husband, his consent to its testamentary disposition is in reality the gift of the husband to the wife's legatee; ⁶ and this view is recognized by the power vested in the husband to retract his consent, even after the wife's death, at any time before probate of the will.⁷

Another exception is said to be the power of a married woman to dispose by will (without the husband's consent) of property which she holds in *auter droit*, as where she takes as executrix; ⁸ but this affects only such property as passes by representation, and includes none in which she has a beneficial interest, to which the right of the husband would attach.⁹

It is also mentioned as an exception to the disability of a married woman to devise property, that she may do so in pursuance of a sufficient *ante* or *post nuptial* contract; ¹⁰ this is clearly the result of the

¹ Murray v. Barlee, 3 M. & K. 209, 220.

² Married women are expressly disabled by the statute of 1 Vict. c. 26, nor was the rule changed in the amendatory statute of 15 & 16 Vict. c. 24.

³ 45 & 46 Vict. c. 75, § 1, pl. 1, § 2.

⁴ Goods of Price, L. R. 12 Prob. D. 137; Goods of Homfray, L. R. 12 Prob. D. 138, note. See Smart v. Trauter, L. R. 43 Ch. D. 587.

⁵ Bransby v. Haines, 1 Cas. Temp. Lee, 120, holding that the will of a married woman, made without the husband's consent, is a mere nullity; but the spirit-

ual courts have jurisdiction to decide the question whether the husband consented or not. Steadman v. Powell, 1 Add. 58; Tucker v. Inman, 4 M. & Gr. 1049, 1076.

⁶ So held *per* North, C. J., in Brook v. Turner, 1 Mod. 211.

⁷ Maas v. Sheffield, 1 Rob. 364, 10 Jur. 417; Brook v. Turner, 2 Mod. 170, 172; Van Winkle v. Schoonmaker, 15 N. J. Eq. 381, 386, *et seq.*

⁸ Scammell v. Wilkinson, 2 East, 552, 556.

⁹ Scammell v. Wilkinson, *supra*.

¹⁰ 1 Redf. on Wills, 24, citing Rich v.

marriage contract, and not the exercise of testamentary power conferred by the law.

[* 27] * But in equity the power of married women to dispose of their real as well as personal property is fully recognized; hence all property over which courts of chancery obtain jurisdiction may be as freely and fully devised by a married woman as by a *feme sole*, whether the legal estate is vested in a trustee or not, since the husband and all persons on whom the legal estate may devolve will be deemed trustees for the persons to whom the wife has given the equitable interest.¹

Cverture no disability in equity.

In America there is a tendency to depart from the ancient doctrine of the common law in respect of the property rights of married women. So great is the progress already made in this direction, that it seems not impossible that at some future day the principles of the civil law will have entirely supplanted the common law in this respect, and when no distinction will be recognized between the sexes, and between married and unmarried females, in respect of their right to acquire, hold, and dispose of property.²

Tendency in America to abolish incapacity from coverture.

In respect of the testamentary power of married women they have been placed upon a footing of substantial, if not absolute, equality with unmarried women and men in Arizona,³ Arkansas,⁴ Connecticut, Florida,⁵ Illinois,⁶ Indiana, Iowa, Louisiana, Maine,⁷ Maryland,⁸ Michigan,⁹ Minnesota,¹⁰ Mississippi,¹¹ Montana,¹² Nebraska,¹³ Nevada,¹⁴ New Hampshire,¹⁵ New York,¹⁶ Ohio,¹⁷ Pennsylvania,¹⁸ South Carolina,¹⁹ South

States putting married women upon same footing with unmarried women and men.

Cockell, 9 Ves. 368, 375; Hodsdon v. Lloyd, 2 Br. C. C. 534. See the Chancellor's remarks, p. 543; the will was made before marriage, and held revoked by the marriage.

¹ 1 Jarm. on Wills, * 39-41. See the elaborate statement by the American editor of the common-law doctrine of testamentary incapacity by coverture, p. * 41.

² The Married Women's Property Act, 1882, also indicates the policy of England to place a married woman, so far as her separate property is concerned, in the position of a *feme sole*: Butt, J., in Goods of Price, L. R. 12 Prob. D. 137, 138.

³ Rev. St. Ariz. 1887, § 3232.

⁴ Dig. of St. 1894, §§ 7390, 7391.

⁵ Rev. St. Fla. 1892, § 1793.

⁶ St. & Curt. St. 1896, ch. 148, ¶ 1.

⁷ Rev. St. c. 61, § 1. See Meserve v. Meserve, 63 Me. 518.

⁸ Pub. G. L. 1888, art. 93, § 309. See Schull v. Murray, 32 Md. 9, 15.

⁹ Const., art. xvi. § 5.

¹⁰ Gen. St. 1891, § 5627.

¹¹ Miss. Ann. Code, 1892, § 4488. "A married woman enjoys as large a freedom in this State as a man in regard to the testamentary disposition of her property. She may dispose of her estate, real and personal, by last will and testament, in the same manner as if she were not married": Kelly v. Alfred, 65 Miss. 495, 497.

¹² St. Mont. 1895, Div. II. § 1720.

¹³ Comp. St. 1891, ch. 23, § 123.

¹⁴ Gen. St. 1885, § 3001.

¹⁵ Pub. St. N. H. ch. 186, § 1.

¹⁶ 2 Banks & Bro. (9th ed.) p. 1875, § 1. See Van Wert v. Benedict, 1 Bradf. 114, 116.

¹⁷ Code, 1897, § 5914; Allen v. Little, 5 Oh. 66, 68, *et seq.*

¹⁸ Laws, 1887; Grubb's Estate, 174 Pa. St. 187.

¹⁹ A will made by a married woman before she was enabled by statute will not

Dakota,¹ Texas,² Utah,³ Vermont,⁴ Washington,⁵ Wisconsin,⁶ and Wyoming;⁷ in some States it was deemed necessary to annex a limitation with reference * to the husband's rights (as [* 28] tenant by the curtesy, etc., in strict analogy with the widow's

right of dower, etc.), as in Missouri,⁸ New Hampshire,⁹ New Jersey,¹⁰ Pennsylvania,¹¹ Oregon,¹² and Rhode Island,¹³ in others, to limit the power to one half of her

property, without consent of the husband in respect of the other half, as in Colorado,¹⁴ Kansas,¹⁵ and Massachusetts.¹⁶ Power to dispose of her separate property by will is given in Alabama,¹⁷ California,¹⁸ Indiana,¹⁹ Kentucky,²⁰ Tennessee,²¹ and Virginia,²² by which it would seem her common-law status is slightly, if at all, changed.

In Georgia, the common law is substantially enacted by statute,²³ and in North Carolina the common law prevails.²⁴ In Delaware a wife may will her property with the consent of her husband expressed in writing and attested by two witnesses; but such will is nevertheless inoperative against the husband's right to curtesy. In Kentucky, where a married woman cannot make a

be validated by the enabling act passed before her death: *Burkett v. Whittemore*, 36 S. C. 428.

¹ Terr. Dak. 1887, § 3806.

² Rev. St. 1895, § 5333. In this State marriage enables an infant female, otherwise disqualified, to make a valid will.

³ Utah, St. 1898, § 2731.

⁴ Vt. St. 1894, § 2346.

⁵ Code Wash. 1896, § 5308.

⁶ Wis. Ann. St. 1889, § 2277 (married women at 18).

⁷ Rev. St. Wyom. 1887, § 1561.

⁸ Rev. St. Mo. 1889, § 8869.

⁹ Code 1893, p. 600, § 5.

¹⁰ Rev. St. N. J. 1895, p. 2014, § 9. See *Vreeland v. Ryno*, 26 N. J. Eq. 160; *Camden Co. v. Ingham*, 40 N. J. Eq. 3, 6.

¹¹ *Dickinson v. Dickinson*, 61 Pa. St. 401. And see *Lee's Appeal*, 124 Pa. St. 74. The act of 1887 (p. 333, § 5) enlarges the *feme covert's* rights, but does not enable her to pass by will property held for her in trust: *Steinmetz' Appeal*, 168 Pa. St. 175.

¹² Code, 1887, § 3068.

¹³ Gen. L. 1896, ch. 203, § 12.

¹⁴ *Mills' Ann. St.* 1891, § 3010.

¹⁵ Gen. St. 1897, §§ 34, 35. See *Barry v. Barry*, 15 Kans. 587; *Bennett v. Hutchinson*, 11 Kans. 398, 408.

¹⁶ In personalty: *Pub. St.* 1882, p. 819,

§ 6. This statute also secures to the husband his curtesy. It is held that the husband takes no interest in his wife's realty devised to others, if he has no curtesy: *Burke v. Colbert*, 144 Mass. 160.

¹⁷ See *Mosser v. Mosser*, 32 Ala. 551, 555; *O'Donnell v. Rodiger*, 76 Ala. 222.

¹⁸ Civ. Code, § 1273.

¹⁹ Formerly: *Noble v. Enos*, 19 Ind. 72. But see *Rev. St.* 1881, § 2557 and subsequent statutes.

²⁰ *Gen. St.* 1883, p. 832, § 4. See *George v. Bussing*, 15 B. Mon. 558, 562.

²¹ *Johnson v. Sharp*, 4 Coldw. 45.

²² Code 1887, § 2286, 2513.

²³ Code 1882, § 2410, giving the reasons for the common-law rule, and all exceptions. But it is there held that a married woman may will her property (the language of the judge is "all they own," which seems to include real and personal property, whether legal or equitable) without her husband's consent: *Urquhart v. Oliver*, 56 Ga. 344, 346. The code of 1895 seems to omit reference to capacity of married women.

²⁴ A married woman may dispose by will of her equitable property: *Leigh v. Smith*, 3 Ired. Eq. 442, 445; and such will must be admitted to probate in the probate court: *Whitfield v. Hurst*, 3 Ired. Eq. 242, 244.

will, it was held that a holographic will executed by a married woman and after her husband's death recognized and adopted by her as her will, is valid.¹ But when the will is not wholly written by testatrix, it must be re-attested after removal of her disability.²

§ 22. **Incapacity of Criminals.** — Other limitations upon the right to dispose of property by last will existed at common law [* 29] * or under ancient English statutes. Traitors and felons were formerly incompetent to devise their lands, because they were by the attainder *ipso facto* vested in the crown.³ Incapacity from criminality. This rule included a *felo de se*⁴ as to his personal property, but he was capable of devising his realty because there was no attainder.⁵ This subject is of little importance now, even in England, attainder having been abolished by statute,⁶ and has not been known in the United States since the adoption of the Federal Constitution. Whether the murder of a testator or ancestor disables the criminal from inheriting is discussed in a later chapter.⁷

¹ Porter v. Ford, 82 Ky. 191.

² Gregory v. Oates, 92 Ky. 532.

³ 1 Jarm. on Wills, * 43 *et seq.*

⁴ But only as to the forfeiture; it was held that the executor of the will of a person found *felo de se* by the verdict of a coroner's inquest is entitled to have pro-

bate, although the personal property of the deceased was forfeit to the crown: Goods of Bailey, 2 Sw. & Tr. 156, 159.

⁵ Norris v. Chambres, 29 Beav. 246, 258.

⁶ 33 & 34 Vict. c. 23.

⁷ Post, § 64.

* CHAPTER IV.

[* 30]

INCAPACITY ARISING FROM MENTAL DISABILITIES.

§ 23. **Degree of Mental Vigor requisite to make a Will.** — The most important ground of testamentary incapacity, fertile in abundant crops of litigation, is that of mental deficiency arising either from idiocy, lunacy, or any other permanent or temporary disorder of the mind, inconsistent with the exercise of free will; or from such weakness of the mind as unfits it to resist undue influences, so that the testator's dispositions cannot be said to be his own spontaneous acts, but are rather the results of importunities, devices, fraudulent representations, or even of threats and force brought to bear upon him by designing persons.

This subject has been much enlarged upon by able and ingenious writers of the legal as well as medical profession, who have treasured up a vast amount of learning in their voluminous books. Referring to them for the details and subtle distinctions drawn between the several forms of incapacity which are held to invalidate wills, it is nevertheless necessary to examine the principal grounds constituting such incapacity, in order to point out the principles upon which, under our system of laws, property passes by will.

It is conceded on all hands that no rule can be laid down to indicate the precise degree of intelligence or mental vigor necessary to constitute testamentary capacity. The nearest approach thereto is the requirement of the same capacity for testamentary purposes as for the transaction of the ordinary business of life. Business capacity as a test. A party capable of acting rationally in buying and selling property, settling accounts, collecting and paying out money, or borrowing or loaning money, is capable of making a valid will.¹ But inadequate as such a rule is, because the sole criterion which it furnishes is an uncertain factor, itself to be ascertained by the jury from evidence depending more or less upon the opinion of witnesses, it is not of universal application; for it has been held, as will appear from * the further consideration of this subject,² that [* 31] a man may be incapable of managing his business, or to make a contract, and yet competent to make a valid will.³ The doctrine

¹ Meeker v. Meeker, 75 Ill. 260, 266.

² Post, § 29.

See also Bice v. Hall, 120 Ill. 597, 601; Brown v. Riggan, 94 Ill. 560.

³ The broad statement by the reporter of the case of Townsend v. Bogart, 5 Redf.

once held in Illinois, that inability to perform or transact ordinary business is a correct test of testamentary incapacity, has been expressly receded from.¹ Business capacity is not, therefore, an absolutely reliable standard of testamentary capacity.² But it seems to be held as a general rule, that as it requires no greater mental capacity to dispose of property by will than to transact ordinary business, it has generally been held that capacity to transact such ordinary business would show testamentary capacity.³ The most accurate rule laid down in a number of States seems now to be this: "While the law does not undertake to measure a person's intellect, and define the exact quantity of mind and memory which a testator shall possess to authorize him to make a valid will, yet it does require him to possess mind to know the extent and value of his property, the number and names of the persons who are the natural objects of his bounty, their deserts with reference to their conduct and treatment toward him, their capacity and necessity, and that he shall have sufficient active memory to retain all these facts in his mind long enough to have his will prepared and executed; if he has sufficient mind and memory to do this, the law holds that he has testamentary capacity; and even if this amount of mental capacity is somewhat obscured or clouded, still the will may be sustained."⁴ And it should be remembered that the decisive question always is whether the instrument propounded is the spontaneous act of a person understanding its nature and consequences; and

The will must be the spontaneous act of testator.

93, that a person may be *compos mentis* in the ordinary broad use of the term, and yet be mentally incompetent to make a will, is hardly justified by the language of the surrogate, either in this case (p. 105), or in the case of *Mairs v. Freeman*, 3 Redf. 181, to which reference is made.

¹ *Greene v. Greene*, 145 Ill. 264, 275; *Sinnet v. Bowman*, 151 Ill. 146.

² *Townsend v. Bogart*, 5 Redf. 93, 104; *Kramer v. Weinert*, 81 Ala. 414, 416, citing *Stubbs v. Houston*, 33 Ala. 555; *Sinnet v. Bowman*, 151 Ill. 146, 155. In Maryland the statute provides that to make a valid will the testator must be capable of executing a valid deed or contract: *Davis v. Calvert*, 5 G. & J. 269; *Stewart v. Elliott*, 2 Mackey, 307, 318.

³ *Craig v. Southard*, 148 Ill. 37, 45.

⁴ *Bundy v. McKnight*, 48 Ind. 502, instruction to the jury, p. 511, approved, p. 514. See cases there cited: *Moore v. Moore*, 2 Bradf. 261; *Morris v. Stokes*, 21 Ga. 552, 571. Also cases cited by Calvin, Surrogate, in *Townsend v. Bogart*, *supra*: *Van Guysling v. Van Kuren*, 35

N. Y. 70; *Barnhart v. Smith*, 86 N. C. 473, 483. To similar effect: *Elliott v. Welby*, 13 Mo. App. 19, 24; *Couch v. Gentry*, 113 Mo. 248; *Benoist v. Murrin*, 58 Mo. 307, 322; affirmed, *Jackson v. Hardin*, 83 Mo. 175, 180; *Delafield v. Parish*, 25 N. Y. 9, 29, citing numerous cases; *Snelling's Will*, 136 N. Y. 515; *Campbell v. Campbell*, 130 Ill. 466; *Tucker v. Sundfidge*, 85 Va. 546; *O'Donnell v. Rodiger*, 76 Ala. 222, 228. See *Rice v. Rice*, 53 Mich. 432, 437; *Ballantine v. Proudfoot*, 62 Wis. 216; *Will of Farnsworth*, 62 Wis. 474; *Delaney v. Salina*, 34 Kans. 532; *Sherley v. Sherley*, 81 Ky. 240, 249; *Blough v. Parry*, 144 Ind. 463, 489; *Burkhart v. Gladish*, 123 Ind. 337; *Shaver v. McCarthy*, 110 Pa. St. 339; *Stoutenburg v. Hopkins*, 43 N. J. Eq. 577; *Chrisman v. Chrisman*, 16 Oreg. 127; *Epling v. Hutton*, 121 Ill. 555. "And medical experts cannot set aside the law by stating that these facts make no difference with their opinions:" *Pren-tis v. Bates*, 88 Mich. 567, 591; s. c. on rehearing, 93 Mich. 234. "A person may

that this is, ultimately, a question of fact to be determined by the jury.¹

* § 24. **Incapacity of Idiots.** — An idiot is said to be a person wholly destitute of the reasoning faculty, unable to compare

two ideas together,² and utterly incapacitated for the transaction of any business.³ Early writers laid down very narrow tests of idiocy, such as inability to count twenty pence, to tell father or mother, or how old he is;⁴

Blackstone lays down the same rule nearly two centuries afterward,⁵ and Lord Hardwicke said that the term *non compos mentis* imports not weakness of understanding, but a total deprivation of reason.⁶ In later years, courts of equity, both in England and America, have taken jurisdiction of persons who had become from any cause so weak and incapacitated in mind as to be unable to manage their affairs, and placed them under guardianship;⁷ but in respect of the testatory power it seems that, while the will of a person proved an idiot is of course void,⁸ mere weakness of mind, imbecility, whimsicality, or eccentricity is not sufficient, in the absence of other proof of incapacity, to invalidate a will.⁹

be mentally competent to dispose of a small estate among a few persons, and yet not have capacity to dispose of a large estate among a greater number": Taylor v. Pegram, 151 Ill. 106, 120.

¹ See the case of Potts v. House, 6 Ga. 324, 350, *et seq.*; Stewart v. Lisenard, 26 Wend. 255, 296, *et seq.*; Comstock v. Hadlyme, 8 Conn. 254, 264; Cordrey v. Cordrey, 1 Houst. 269, 273; Trish v. Newell, 62 Ill. 196, 203; Brooke v. Townsend, 7 Gill, 10, 32; Stevens v. Vancleve, 4 Wash. C. C. 262, 269; Boyd v. Eby, 8 Watts, 66, 70; Gardiner v. Gardiner, 34 N. Y. 155, 157.

It is error to take from the jury the question of undue influence, or to tell them that in case of doubt they must find for the will: Muller v. St. Louis Hospital, 73 Mo. 242, affirming s. c. 5 Mo. App. 390. But where the testimony is such that the court in the exercise of a sound legal discretion would not sustain the verdict, the court should refuse to direct an issue: Eddey's Appeal, 109 Pa. St. 406; Herster v. Herster, 116 Pa. St. 612; s. c. 122 Pa. St. 239, 264. To same effect: McFadin v. Catron, 138 Mo. 197; Nelson's Will, 39 Minn. 204; *In re Wilson*, 117 Cal. 262, and see also on effect to be given to the jury's verdict, *post*, § 227, p. * 500, note.

² See Dr. Ray, Med. Jur. Insan., § 60 (5th ed.).

³ Bannatyne v. Bannatyne, 14 Eng. L. & Eq. 581, 590.

⁴ "So as it may appear that he hath no understanding or reason what shall be for his profit, or what for his loss: but if he hath such understanding, that he know and understand his letters, and read by teaching or information of another man, then it seemeth he is not a fool or natural idiot." Comment ascribed to Lord Hale, in Fitzherbert's Natura Brevium, 233.

⁵ "A man is not an idiot if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters." 1 Bla. Comm. 304.

⁶ *Ex parte Barnsley*, 3 Atk. 168, 173.

⁷ Gibson v. Jeyes, 6 Ves. 266, 272; Ridgway v. Darwin, 8 Ves. 65; *In re Barker*, 2 Johns. Ch. 233.

⁸ 1 Jarm. on Wills, * 34; Whart. & Stillé, Med. Jur. § 20.

⁹ The cases so holding are very numerous. See Stewart v. Lisenard, 26 Wend. 255, particularly the Surrogate's opinion, p. 263; the Chancellor's opinion, p. 290; and the opinions of Senators Verplanck, p. 296, and Scott, p. 314; Lee v. Lee, 4 McCord, 183; Delafield v. Parish, 25 N. Y. 9, 102; Kinne v. Kinne, 9 Conn.

§ 25. **Incapacity of Lunatics.** — Unless, therefore, a person is proved to have been an idiot, or natural fool, some other evidence [* 33] * of incapacity must exist, in addition to imbecility or weakness of the mind, to invalidate his will. Persons *non compos mentis* — or of unsound mind, which terms are now generally conceded to mean the same thing¹ — may be lunatics, distinguishable from idiots chiefly by the periodicity or partial nature of the disorder of their mind, while idiots are uniformly and wholly deprived of reason; and from imbeciles, who may or may not possess sufficient vigor of mind to dispose of their property, according to the circumstances by which they are surrounded, while lunatics who are not imbeciles, but affected with delusions, may have ample mental force, but exercise it in an abnormal or perverted manner. The importance of the distinction lies in the difference of the treatment of the issue of *devisavit vel non*, and of the evidence under it, necessary to meet the case arising on the one or other ground. For if it be proved that the testator was an idiot, this will invalidate the will. If it be shown that he was of weak mind, the question will be whether there was undue influence. If his mind was affected by delusions, the validity of the will must depend upon the further question whether it is affected by, or its provisions are the consequence of, an insane delusion.²

Lunacy or
periodical
insanity.

The term lunacy originated in the hypothesis formerly entertained concerning periodical insanity, that the persons affected were under the influence of the moon; it is now used in the law to denote insanity or derangement of the mind generally.³ It is said to be a disease of the brain, a mental disorder, by which the freedom of the will is impaired. The legal test of insanity is delusion. "Insane delusion consists in a belief of facts which no rational person would believe;"⁴ taking things for realities which exist only in the imagination,⁵ and which [* 34] are impossible in the nature of things;⁶ "mingling * ideas

Now applied
to derange-
ment of mind
generally.

102, 105; *Harrison v. Rowan*, 3 Wash. C. C. 580, 586; *Hall v. Dougherty*, 5 Houst. 435, 449.

¹ 1 Redf. on Wills, * 59, pl. 1; *Ib.*, 61, pl. 5; *Buswell on Insanity*, § 18.

² See *Bigelow's note* (1), 1 *Jarm. on Wills*, * 38, in which he calls attention to the necessity of this distinction, and collects numerous English and American authorities on the subject under consideration.

³ *Per Patton, Pr.*, in *McElroy's Case*, 6 W. & S. 451, 453. Webster mentions, under the word "Insanity," Lunacy, Madness, Derangement, Alienation, Aberra-

tion, Mania, Delirium, Frenzy, Monomania, Dementia, as synonyms.

⁴ *Forman's Will*, 54 Barb. 274, 289, quoting from *Dew v. Clark*, 3 Addams's Eccl. R. 79. See also various definitions quoted in *Kimberly's Appeal*, 68 Conn. 428, 435.

⁵ *Waring v. Waring*, 6 Thornton's Notes, 388; *Morse v. Scott*, 4 Dem. 507, 508. See also *Potter v. Jones*, 20 Oreg. 239.

⁶ *Ray's Med. Jur.* § 169. "It is of the essence of an insane delusion, that, as it has no basis in reason, so it cannot by reason be dispersed": *Merrill v. Rolston*, 5 Redf. 220, 251.

of imagination with those of sensation, and mistaking one for the other." ¹

Partial insanity, where a person has insane delusions as to one or more subjects, and not as to others, does not destroy testamentary capacity, unless the insane delusion concerns the subject of the testamentary disposition.² But however unimpaired the memory may be, and although there may be reasoning power, if there be insane delusion concerning the property which one seeks to dispose of, he cannot make a valid will.³

Neither superstition nor ignorance, however gross,⁴ nor error in fact,⁵ nor prejudice,⁶ nor unfounded suspicion,⁷ amounts to an insane

¹ *Duffield v. Morris*, 2 Harr. (Del.) 375, 380. See Whart. & Stillé's *Med. Jurispr.* (4th ed.) § 19 *et seq.*, § 305 *et seq.*

² *Forman's Will*, 54 Barb. 274, 289 *et seq.*, citing (p. 289) *Dew v. Clark*, 3 Addams's Eccl. R. 79; *Frere v. Peacocke*, 1 Rob. Eccl. R. 442, 445; *Fulleck v. Allinson*, 3 Hagg. 527; *Seaman's Friend Soc. v. Hopper*, 33 N. Y. 619; *Stanton v. Wetherwax*, 16 Barb. 259; *Potter v. Jones*, 20 Oreg. 239; *Taylor v. Trich*, 165 Pa. St. 586, 603, 605. See also *Cotton v. Ulmer*, 45 Ala. 378, 395; *Boardman v. Woodman*, 47 N. H. 120; *Gardner v. Lamback*, 47 Ga. 133, 192; *Hollinger v. Syms*, 37 N. J. Eq. 221, 236, *et seq.*; *Benoist v. Murrin*, 58 Mo. 307, 323; *Rice v. Rice*, 53 Mich. 432, 434; *Brace v. Black*, 125 Ill. 33. It was held in Louisiana, that where a person himself, unaided by others, makes a sage and judicious will containing nothing "sounding in folly," it will be presumed, in the case of a person habitually insane, that it was made during a lucid interval, throwing the burden of proof upon those attacking it: *Kingsbury v. Whittaker*, 32 La. An. 1055, 1061, *et seq.* See *Vance v. Upson*, 66 Tex. 476, 488.

³ *Brinton's Estate*, 13 Phila. 234; *Tawney v. Long*, 76 Pa. St. 106, 111, 116; *Taylor v. Trich*, 165 Pa. St. 586; *Ballantine v. Proudfoot*, 62 Wis. 216.

⁴ *Florey v. Florey*, 24 Ala. 241, 249, *et seq.*; *Leech v. Leech*, 1 Phila. 244, 247; *Addington v. Wilson*, 5 Ind. 137, 139; *Gass v. Gass*, 3 Humph. 278, 282; *Chafin Will Case*, 32 Wis. 557, 564. Belief in spiritualism has often been held not to be conclusive evidence of insanity: *Orchard-*

son v. Cofield, 171 Ill. 14; *Denson v. Beazley*, 34 Tex. 191, 198, and dissenting opinion, 206 *et seq.*; *Otto v. Doty*, 61 Iowa, 23; *Storey's Will*, 20 Ill. App. 183, 194; *Whipple v. Eddy*, 161 Ill. 114; *In re Spencer*, 96 Cal. 448; *McClary v. Stull*, 44 Neb. 175; *Will of Smith*, 52 Wis. 543, 547, *et seq.*; and *Brown v. Ward*, 53 Md. 376; all holding that a belief in spiritualism is not of itself a certain test of insanity. *La Bau v. Vanderbilt*, 3 Redf. 384, 388, holding that a belief in clairvoyance does not invalidate a will, unless it be shown that it was the offspring of such belief. To similar effect, *Schildknecht v. Rompf*, 4 Southw. R. (Ky.) 235. And see the reporter's note appended to *Middleditch v. Williams*, 45 N. J. Eq. 726, 727, for a collection of cases on the effect of spiritualism and similar beliefs on wills.

⁵ *Hall v. Hall*, 38 Ala. 131, 134; *Clapp v. Fullerton*, 34 N. Y. 190; *Hite v. Sims*, 94 Ind. 333; *Middleditch v. Williams*, 45 N. J. Eq. 726; *Will of White*, 121 N. Y. 406; *Cline's Will*, 24 Oreg. 175. But see *Ballantine v. Proudfoot*, 62 Wis. 217, where the erroneous impression of the testatrix as to the conduct of her daughter was held an insane delusion avoiding the will; and see also *Re Dorman*, 5 Dem. 112. And a will made as the offspring of a monomaniacal delusion of the testator against his daughter, and the supposed misconduct of such daughter, which has no existence whatever, being merely the creation of testator's imagination, such will will be set aside: *Thomas v. Carter*, 170 Pa. St. 272.

⁶ *Den v. Gibbons*, 22 N. J. L. 117, 155;

⁷ *Seaman's Friend Society v. Hopper* (Hopper Will Case), 33 N. Y. 619, 624; *Stackhouse v. Norton*, 15 N. J. Eq. 202,

228; *Cole's Will*, 49 Wis. 179, 181; *Potter v. Jones*, 20 Oreg. 239.

delusion. Nor does moral insanity, unaccompanied by insane delusion, vitiate a will, however unjust, unnatural, or perverse the content, or immoral * the motive may be.¹ But such facts may be shown, together with other evidence on the question of unsoundness of mind.²

What are not insane delusions.

§ 26. **Presumption of Sanity, and Lucid Intervals.** — As partial insanity, or the existence of delusion on one or more subjects (monomania), is not sufficient to invalidate a will unless the delusion be upon the subject affected by the testatory act,³ so, too, the will of an insane person may be valid, if it be shown that it was executed during a lucid interval. The importance, in a legal sense, of the subject of lucid intervals in a mind affected by insanity, is due, like that of the distinction between idiocy and lunacy, to the nature of the evidence necessary to establish the will of a person proved to have been insane. For the burden of proving the validity of a will resting necessarily upon him who propounds it for probate, it is obvious that he must show, among other things, the sanity of the testator, without which his proof must fail, and the instrument propounded cannot receive probate.⁴ But since experience has shown that sanity or soundness is the general condition of the human mind, the law permits the proponent of the instrument to rely on the presumption of sanity arising out of this experience, instead of requiring affirmative or actual proof thereof. If, therefore, a will is produced, and its due execution proved, this, in the absence of further proof, is sufficient to establish the will.⁵ This presumption, however,

Burden of proof of sanity is always on proponent.

But may consist in the presumption of sanity.

Jenckes v. Smithfield, 2 R. I. 255, 263; *Phillips v. Chater*, 1 Dem. 533; *Carter v. Dixon*, 69 Ga. 82; *Salisbury v. Aldrich*, 118 Ill. 199, 203; *Chaney v. Bryan*, 16 Lea, 63, 68; *Schneider v. Manning*, 121 Ill. 376; *In re Spencer*, 96 Cal. 448.

¹ If the disposition is not against the policy of the law. See *Dew v. Clark*, *supra*; *Boardman v. Woodman*, 47 N. H. 120, 136; *Frere v. Peacocke*, *supra*; *Nicholas v. Kershner*, 20 W. Va. 251; *Mayo v. Jones*, 78 N. C. 402, 406; *Carpenter v. Calvert*, 83 Ill. 62, 70; *Higgins v. Carlton*, 28 Md. 115; *Lewis's Case*, 33 N. J. Eq. 219, 226, holding that a man may be a thief, a miser, unclean, profane, and of ungovernable temper, and yet have testamentary capacity; *Will of Blakely*, 48 Wis. 294. "A will may be contrary to the principles of justice and humanity, its provisions may be shockingly unnatural and extremely unjust, nevertheless, if it appear to have been made by a person of sufficient age to be competent to make a

will, and also to be the free and unconstrained product of a sound mind, the courts are bound to uphold it": *Middle-ditch v. Williams*, 45 N. J. Eq. 726, 729; *Smith v. Smith*, 48 N. J. Eq. 566, 591; *In re Wilson*, 117 Cal. 262. And a gift to one with whom the testator lived in adultery or concubinage is not for that reason void: see *post*, § 31, p. * 48, n. 5.

² *Bitner v. Bitner*, 65 Pa. St. 347, 362; *Mayo v. Jones*, *supra*; *Leech v. Leech*, 1 Phila. 244; *Woodbury v. Obear*, 7 Gray, 467, 470; *Hubbard v. Hubbard*, 7 Ore. 42, 46; *Lamb v. Lamb*, 105 Ind. 456, 462; *Gurley v. Park*, 135 Ind. 440; *Nicewander v. Nicewander*, 151 Ill. 156; *Sherley v. Sherley*, 81 Ky. 240.

³ *Ante*, § 25.

⁴ *Wms. Ex.* [21].

⁵ At least in contentious proceedings. The statutory requirements in the several States, and the rules of proceeding in the probate of a will in common form, or in a non-contentious or *ex parte* proceeding,

This presumption may be rebutted.

And then it may be shown that will was made during a lucid interval.

The applicability of the presumption of sanity, and its extent in support of a last will, has given rise to voluminous discussions in text-books and in the courts of the several American States. The

States in which the presumption of sanity may be relied on.

may be met by evidence of the testator's incompetency, which may or may not convince the jury; if it fail to disturb their confidence in his competency, the presumption will still prevail, although no evidence of sanity be

* offered. But if the evidence be such as to show [* 36] the existence of insanity in the testator generally, so that in the absence of further proof the presumption of sanity would be rebutted, it may still be shown, in support of the will, that it was made during a lucid interval.¹

prevailing doctrine (in the absence of statutory provisions to the contrary) is in accordance with the English view, as above stated.² It is so held in Alabama,³ Arkansas,⁴ California,⁵ Delaware,⁶ Indiana,⁷ Iowa,⁸

Kansas,⁹ Kentucky,¹⁰ Maryland,¹¹ Massachusetts,¹² * Missis- [* 37]

may raise a different rule. See on this subject, *post*, §§ 216, 220.

¹ Cartwright v. Cartwright, 1 Phillim. 90, 100, in which Sir Wm. Wynne states the law as follows: "If you can establish that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it; but the effect of it is this, it inverts the order of proof and of presumption; for until proof of an habitual insanity is made, the presumption is that the party agent, like all human creatures, was rational; but where an habitual insanity, in the mind of the person who does the act, is established, there the party who would take advantage of an interval of reason must prove it." See *Wms. Ex.* [20] *et seq.*, and numerous English cases cited there. 1 *Jarm. on Wills*, * 37.

² *Wms. Ex.* [20] *et seq.* See preceding note.

³ *Stubbs v. Houston*, 33 Ala. 555, 563, in effect overruling *Dunlap v. Robinson*, 28 Ala. 100; *Cotton v. Ulmer*, 45 Ala. 378, 396; *O'Donnell v. Rodiger*, 76 Ala. 222, 227; *Eastis v. Montgomery*, 95 Ala. 486, 494.

¹¹ *Taylor v. Cresswell*, 45 Md. 422, 430. "In this State the presumption of law is in favor of sanity, and the burthen of

⁴ *McDaniel v. Crosby*, 19 Ark. 533, 545, on the authority of and approving *Rogers v. Diamond*, 13 Ark. 474, and several English cases so holding; *McCulloch v. Campbell*, 49 Ark. 367.

⁵ *Panaud v. Jones*, 1 Cal. 488 (*per* Benet, J. p. 438).

⁶ *Chandler v. Ferris*, 1 Harr. 454, 461; *Jamison v. Jamison*, 3 Houst. 108, 124. The Syllabus omits to mention this point; the charge to the jury contains these words: "The presumption of law is in favor of his capacity; the burden of showing want of capacity rests on those who oppose the will; and it is incumbent on them to show such incapacity by satisfactory proof." (p. 124.)

⁷ *Turner v. Cook*, 36 Ind. 129, 137. In this case the statute is referred to as requiring proof, in probate in the common form, of execution, competence, and freedom from restraint; but throws the onus to prove unsoundness of mind on the party alleging it. *Blough v. Parry*, 144 Ind. 463.

⁸ *Webber v. Sullivan*, 58 Iowa, 260, 266.

⁹ *Rich v. Bowker*, 25 Kans. 7, 12.

¹⁰ *Milton v. Hunter*, 13 Bush, 163, 170, distinguishing between the practice in probate courts, where the statute requires

proof is upon the party impeaching a will for want of testamentary capacity."

¹² It was held in this State, in the case

issippi,¹ New Hampshire,² New Jersey,³ New York,⁴ North Carolina,⁵ Oregon,⁶ Pennsylvania,⁷ Tennessee,⁸ and apparently in Wisconsin.⁹ The States in which the presumption is held inapplicable or insufficient, and that affirmative evidence of the testator's sanity is necessary to establish the will, are Connecticut,¹⁰ Georgia,¹¹ Illinois,¹² Maine,¹³ Michigan,¹⁴ Minnesota,¹⁵

the witnesses to be interrogated concerning the testator's sanity, and the contest of a will in chancery or on appeal; affirmed in *Flood v. Pragoff*, 79 Ky. 607, 612.

¹ *Payne v. Banks*, 32 Miss. 292, 296.

² *Pettes v. Bingham*, 10 N. H. 514, 515, affirmed in *Perkins v. Perkins*, 39 N. H. 163, 167.

³ *Elkinten v. Brick*, 44 N. J. Eq. 154, 158; *Whitenack v. Stryker*, 2 N. J. Eq. 8, 11, affirming the rule as stated in the text, and repeated in *Turner v. Cheesman*, 15 N. J. Eq. 243, 245, and *Boylan v. Meeker*, 28 N. J. L. 274, 280; and in *Den v. Gibbons*, 22 N. J. L. 117, the court approve an instruction to the jury, that the existence of doubt should be decisive against the conclusion of insanity, p. 141.

⁴ *Ean v. Snyder*, 46 Barb. 230, 232; *Gombault v. Public Administrator*, 4 Bradf. 226, 244; *Brown v. Torrey*, 24 Barb. 583, 586.

⁵ *Mayo v. Jones*, 78 N. C. 402, 403, *et seq.*, distinguishing between the probate in common form and the trial of an issue between parties, p. 405.

⁶ *Clark v. Ellis*, 9 Oreg. 128, 142, *et seq.*; *Chrisman v. Chrisman*, 16 Oreg. 127.

⁷ *Grubbs v. McDonald*, 91 Pa. St. 236, 241, citing *Landis v. Landis*, 1 Grant, 248.

⁸ *Puryear v. Reese*, 6 Coldw. 21, 25; *Bartee v. Thompson*, 8 Baxt. 508, 512.

⁹ In *Lewis's Will*, the judge, having found the testator to be competent by preponderance of evidence, adds: "The presumption is that he continued competent to do so until the will was executed; . . . we think the contestant has failed to overthrow that presumption": 51 Wis. 101, 112; *Cole's Will*, 49 Wis. 179, 182; *Lyon, J.*, in *Silverthorn's Will*, 68 Wis. 372, 379, states that in his opinion the statute requires affirmative proof to be made of the mental soundness of the testator before the will can be admitted

to probate; but slight evidence is sufficient to put the contestant to his proofs upon that question: *Allen v. Griffin*, 69 Wis. 529, 537.

¹⁰ *Knox's Appeal*, 26 Conn. 20, 22, affirming *Comstock v. Hadlyme*, 8 Conn. 254, and relying for authority on Maine and Massachusetts cases. (But in Massachusetts the law is otherwise: see *Baxter v. Abbott*, *supra*.) But merely formal proof by the proponent in the first instance is enough to discharge the burden and then that of proving incapacity rests on the party alleging it: *Barber's Appeal*, 63 Conn. 393, with a full discussion and citation of cases.

¹¹ *Evans v. Arnold*, 52 Ga. 169, 179, *et seq.* This case does not entirely reject the presumption of sanity, but requires some affirmative proof. It is affirmed in *Wetter v. Haversham*, 60 Ga. 193, 194, and relies for authority on Maine, Connecticut, and Michigan cases.

¹² *Carpenter v. Calvert*, 83 Ill. 62, 71, holding affirmative proof of sanity to be required by the terms of the statute in the first instance. *Wilbur v. Wilbur*, 129 Ill. 392. The contestant of the validity of the will should introduce all his evidence in the first instance and not merely establish a *prima facie* case, his subsequent evidence being only in rebuttal; this, though upon a *prima facie* case being made, the presumption of sanity then arises, which casts the burden upon the contestant to show, by a preponderance of all the evidence, that the testator had not mental capacity to make a will: *Craig v. Southard*, 148 Ill. 37, 44.

¹³ *Robinson v. Adams*, 62 Me. 369; *Cilley v. Cilley*, 34 Me. 162; *Barnes v. Barnes*, 66 Me. 286; *Gerrish v. Nason*, 22 Me. 438, 441.

¹⁴ *McGinnis v. Kempsey*, 27 Mich. 363, 373.

¹⁵ *Layman's Will*, 48 Minn. 371.

of *Crowninshield v. Crowninshield*, that the burden of proof of the testator's san-

ity did not shift from the proponent even upon proof of sanity by the subscribing

Missouri,¹ Nebraska,² Texas,³ Vermont,⁴ Washington,⁵ and West Virginia.⁶ * In Ohio the statute requires proof to be [* 38] made in common form, and makes such probate *prima facie* valid; hence the presumption of sanity is immaterial.⁷ But even in some of these States the presumption of sanity, although it may not be sufficient when entirely unsupported by affirmative testimony, may be relied on in aid of such affirmative testimony, and will have its effect in cases where the testimony is doubtful or contradictory.⁸

§ 27. **Presumption of Insanity.**—When such evidence has been produced as will satisfy the jury of the testator's insanity before or recently after the execution of the will, it is of course indispensable to the validity of the will that it be shown to have been executed during a lucid interval, or upon cessation, whether temporary or permanent, of the malady.⁹ If the proof of insanity consist in the decree or judgment of a competent court declaring the testator to be *non compos mentis*, and placing him under guardianship, the presumption is, and continues until there be a decree or judgment by a competent court declaring his restoration, that he is incompetent to make a valid will;¹⁰ but this presumption may be rebutted by proof

Insanity shown, there must be proof of lucid interval or cessation of insanity.

¹ As intimated by Napton, J., in *Harris v. Hays*, 53 Mo. 90, 96. See also *Müller v. St. Louis Hospital*, 5 Mo. App. 390, in which an instruction to the jury was refused, that upon equiponderance of evidence the verdict should be in favor of the will. This case was approved in 73 Mo. 242, and later cases turning on this point are not inconsistent therewith: *Jackson v. Hardin*, 83 Mo. 175, 182; *Elliot v. Welby*, 13 Mo. App. 19, 28; *Jones v. Roberts*, 37 Mo. App. 163; and it was expressly so held in *Norton v. Paxton*, 110 Mo. 456, citing prior cases; *Carl v. Goebel*, 120 Mo. 283.

² *Seebrock v. Fedowa*, 30 Neb. 424; *Murry v. Hennessey*, 48 Neb. 608.

³ *Beazley v. Denson*, 40 Tex. 416, 424.

⁴ *Williams v. Robinson*, 42 Vt. 658, 631, overruling *dicta* to the contrary in *Robinson v. Hutchinson*, 26 Vt. 38, and *Dean v. Dean*, 27 Vt. 746.

⁵ *Baldwin's Estate*, 13 Wash. 666.

⁶ *McMechen v. McMechen*, 17 W. Va. 688, 700.

⁷ *Mears v. Mears*, 15 Ohio St. 90, 101.

⁸ See *Barber's Appeal*, 63 Conn. 393; *Evans v. Arnold*, *supra*; *Carpenter v. Calvert*, *supra*; *Trish v. Newell*, 62 Ill. 196.

⁹ *Ante*, § 26, p. *36, n. 1. The possibility of lucid intervals is in modern times denied by some eminent alienists. But whether the term "lucid interval" is accurately or improperly used, in the scientific sense, is unimportant for legal purposes. The law recognizes certain conditions of insane persons as enabling them to act intelligently and exercise free will; which is not denied by psychological physicians, but accounted for by them as a temporary mask of the delirium, or one of the phases of the disease conditioned by the periodicity of its nature, — a fleeting remission of the symptoms rather than a change of the pathological condition. See *Whart. & Stillé Med. Jurisp.* §§ 61 *et seq.*, 744 *et seq.*

¹⁰ *White v. Palmer*, 4 Mass. 147, 149; *Breed v. Pratt*, 18 Pick. 115; *Hamilton v. Hamilton*, 10 R. I. 538, 542; *Harden v.*

witnesses, and that the presumption of sanity was rendered inapplicable by the statute: 2 Gray, 524, 532, *et seq.* But in the later case of *Baxter v. Abbott*, 7 Gray, 71, 83, a majority of the court

(Thomas, J., dissenting) held that the legal presumption, in the absence of evidence to the contrary, was in favor of sanity.

showing his sanity at the time of executing the will, although the guardianship be unrepealed,¹ or the Chancellor may, if he is satisfied that such party is competent to dispose of his estate by will, [* 39] with sense and judgment, suspend proceedings * against him, so as to enable him to make a will.² A similar presumption arises, as above stated, when a condition of insanity or derangement of the mind has been proved by witnesses;³ whereby the *onus* to prove sanity at the time of the execution of the will is thrown upon the proponent.⁴ But this presumption does not exist where the malady under which the testator labored was in its nature either accidental or temporary;⁵ nor is it raised by the suicide of the testator soon after making his will.⁶ Delirium, being the direct result of a bodily disease, gen-

Accidental or temporary insanity not presumed to continue,

Hays, 9 Pa. St. 151, 161; *Pancoast v. Graham*, 15 N. J. Eq. 294, 308; *Stevens v. Stevens*, 127 Ind. 560, 569; *Murdy's Appeal*, 123 Pa. St. 464, 473; *Harrison v. Bishop*, 131 Ind. 161 (holding such adjudication *prima facie* but not conclusive evidence of incapacity). "The holdings are numerous to the effect that persons under guardianship are, *prima facie*, disqualified to make a will." *Fenton's Will*, 97 Iowa, 192, 195. In Illinois it is held that the record of a court showing the appointment of a conservator to a person adjudged to be incompetent to manage his affairs, is not competent evidence to show the insanity of such person at the time of making a will subsequent to the adjudication; *Pittard v. Foster*, 12 Ill. App. 132, 139. In Michigan such order may be put in evidence as bearing on the testator's condition, but is not *prima facie* evidence of testamentary incapacity: *Rice v. Rice*, 50 Mich. 448; and in Wisconsin and Vermont the mere fact that such person is under guardianship as to his person and property will not incapacitate him from making a valid will: *Slinger's Will*, 72 Wis. 22; *Robinson v. Robinson*, 39 Vt. 267. Nor is a decree denying the appointment of a guardian an adjudication that such person has then testamentary capacity: *Manley v. Staples*, 62 Vt. 153.

¹ *Stone v. Damon*, 12 Mass. 487, 488; *Whitenack v. Stryker*, 2 N. J. Eq. 8, 28; *Estate of Johnson*, 57 Cal. 529, 531; *Brady v. McBride*, 39 N. J. Eq. 495.

² In the *Matter of Burr*, 2 Barb. Ch. 208, 210.

³ *Clark v. Fisher*, 1 Pai. 171, 174 (but see *Clarke v. Sawyer, infra*, 3 Sandf. Ch. 351); *Morrison v. Smith*, 3 Bradf. 209, 223; *Rush v. Megee*, 36 Ind. 69, 85; *Godden v. Burke*, 35 La. An. 160, 171; *O'Donnell v. Rodiger*, 76 Ala. 222.

⁴ And it is not sufficient to prove sanity before and after the day on which the will was made, but the lucid interval must be proved at the very time: *Harden v. Hays*, 9 Pa. St. 151, 162; *Aubert v. Aubert*, 6 La. An. 104, 108; *Saxon v. Whitaker*, 30 Ala. 237; *Von de Veld v. Judy*, 44 S. W. R. (Mo.) 1117.

Complete restoration need not, however, be shown in proving the lucid interval; it is sufficient to prove a restoration of the faculties of the mind sufficient to enable the testator soundly to judge of the act: *Boyd v. Eby*, 8 Watts, 66, 70; see *Busw. on Insanity*, § 189, and English cases cited, i. a. *Creagh v. Blood*, 2 Jones & LaT. 509, 516.

⁵ *Brooke v. Townshend*, 7 Gill, 10, 31; *Staples v. Wellington*, 58 Me. 453, 459 (stating the law as applied to contracts, applicable *a fortiori* to wills); *McMasters v. Blair*, 29 Pa. St. 298, 302; *Snow v. Benton*, 28 Ill. 306, 308; *Rutherford v. Morris*, 77 Ill. 397, 409, citing *Trish v. Newell*, 62 Ill. 196; *O'Donnell v. Rodiger*, 76 Ala. 222; *Von de Veld v. Judy*, 44 S. W. R. 1117, 1121; *Johnson v. Armstrong*, 97 Ala. 731. See *Blake v. Rourke*, 74 Iowa, 519.

⁶ *Duffield v. Morris*, 2 Harr. 375, 382; *Brooks v. Barrett*, 7 Pick. 94, 97; *McElwee v. Ferguson*, 43 Md. 479, 484; *Bey's Succession*, 46 La. An. 773. It has been held that suicide is evidence tending to

erally abates with the fever producing it, and wholly ceases with restoration to health; hence no presumption of permanent insanity arises from mere delirium.¹ Intoxication or drunkenness, if it exist to the extent of producing mental oblivion, or to disorder the faculties and pervert the judgment, deprives a person of the testamentary capacity while it continues;² but as it ceases with the cause, it is no indication of subsequent disability,³ unless it become habitual, and continue so long as to produce actual insanity.⁴ By itself it does not, as [* 40] rule of law, raise the presumption of incapacity.⁵

§ 28. **Competency of Witnesses on Questions of Sanity.** — “The proof of a lucid interval is a matter of extreme difficulty,” says Williams,⁶ “for this, among other reasons, that the patient is not unfrequently rational, to all outward appearances, without any real abatement of his malady. On the other hand, if the deceased was subject to attacks producing temporary incapacity, and was at other times in full possession of his mental powers, such attacks may naturally create in those who only happen to see him when subject to them a strong opinion of his permanent incapacity. These considerations, while they tend to reconcile the apparent contradictions of witnesses, render it necessary for the court to rely but little upon mere opinion, to look at the grounds upon which opinions are formed, and to be guided in its own judgment by facts proved, and by acts done, rather than by the judgments of others.”⁷

show insanity: *Frery v. Gusha*, 59 Vt. 257, 264; *Godden v. Burke*, 35 La. An. 160, 171.

¹ 1 Redf. on Wills, 92; Busw. on Insanity, § 191; *Clarke v. Sawyer*, 3 Sandf. Ch. 351, 410 (a case of apoplexy, causing paralysis; see *Clark v. Fisher*, *supra*, 1 Pai. 171); *Brown v. Riggis*, 94 Ill. 560, 569 (a case of epileptic attacks, attended with convulsions, fever, and delirium).

² 1 Redf. on Wills, 160, and authorities there cited; 1 Jarm. on Wills, * 34, note 1, and authorities. Intoxication at the time of making the will does not of itself avoid it, if it does not prevent him from knowing what he is about: *Pierce v. Pierce*, 38 Mich. 412, 417; *Key v. Holloway*, 7 Baxter, 575, 585.

³ *Wheeler v. Alderson*, 3 Hagg. 574, 602; *Ayrey v. Hill*, 2 Add. 206, 210; *Gardner v. Gardner*, 22 Wend. 526, 533, *et seq.*; *Peck v. Cary*, 27 N. Y. 9, 17; *Julke v. Adam*, 1 Redf. 454, 457; *Pierce v. Pierce*, 38 Mich. 412, 418; *Turner v. Cheesman*, 15 N. J. Eq. 243, 246; *Thompson v. Kynner*, 65 Pa. St. 368, 378; *Estate*

of *Johnson*, 57 Cal. 529; *Lang's Estate*, 65 Cal. 19; *In re Wilson*, 117 Cal. 262 (with full discussion by the court).

⁴ *Duffield v. Morris*, *supra*, in which *Harrington, J.*, said: “It is not improbable that drunkenness long continued or much indulged in may produce on some minds and with some temperaments permanent derangement, fixed insanity.” *Gardner v. Gardner*, *supra*; *McSorley v. McSorley*, 2 Bradf. 188, 198; *Cochrane's Will*, 1 T. B. Mon. 263.

⁵ *Gardner v. Gardner*, 22 Wend. 526; *Lewis v. Jones*, 50 Barb. 645; *Ex parte Patterson*, 4 How. Pr. 34; *Leckey v. Cunningham*, 56 Pa. St. 370; *McPherson's Appeal*, 11 Atl. R. 205 (Pa.); *Bannister v. Jackson*, 45 N. J. Eq. 702.

⁶ *Wms. Ex. [22]*, citing *Sir John Nicholl* in *White v. Driver*, 1 Phillim. 84, 88; citing also *Bragden v. Brown*, 2 Add. 441, 445; *Ayrey v. Hill*, 2 Add. 206, 210; and other English authorities.

⁷ *Kinleside v. Harrison*, 2 Phillim. 449, 459, and other English authorities.

But there is a difficulty attaching to the subject of the proof of insanity itself, apart from the distinction between general sanity and lucid intervals, which in the nature of things compels resort to the opinions of witnesses, although they may not be professionals or experts.¹ The opinion of non-professional witnesses as to the sanity or insanity of the testator is [* 41] generally permitted to be given, although the authorities * are by no means unanimous on this subject.² In some States this is confined to the subscribing witnesses;³ but in by far the greater number, courts permit non-experts, whether subscribing witnesses or not, to give their opinion of the testator's sanity on condition of stating also the facts upon which it is based. So in Alabama,⁴ Arkansas,⁵ California,⁶ Connecticut,⁷ Delaware,⁸ Georgia,⁹ Illinois,¹⁰ Indiana,¹¹ Iowa,¹²

Necessity of testimony of non-experts.

Testimony of subscribing witnesses always admitted.

Non-experts must state facts upon

¹ "They are competent because, considered in connection with the means of observation on which they are based, they are the best evidence of which the case in its nature is susceptible. From the nature of the subject, it cannot generally be so described by witnesses as to enable others to form an accurate judgment in regard to it:" Doe, J., dissenting, in *Boardman v. Woodman*, 47 N. H. 120, 144; *Cline v. Lindsey*, 110 Ind. 337, 341; 1 Redf. on Wills, 139, pl. 4; and see p. 140 *et seq.*; also p. 137, pl. 3; Whart. & St. Med. Jurisp. §§ 257 *et seq.*

² 1 Redf. on Wills, 140 *et seq.* It is noticeable, however, that the doctrine according to which the testimony of non-professional witnesses is admissible is gaining ground. See authorities, *infra*.

³ *Ware v. Ware*, 8 Me. 42, 54, *et seq.*; *Poole v. Richardson*, 3 Mass. 330; *Needham v. Ide*, 5 Pick. 510, 512; *McConnell v. Wildes*, 153 Mass. 487. In the case of *Baxter v. Abbott*, 7 Gray, 71, Judge Thomas regrets the rule but sustains it: "If it were a new question, I should be disposed to allow every witness to give his opinion, subject to cross-examination upon the reasons upon which it is based, his degree of intelligence, and his means of observation. It is at least unwise to increase the existing restrictions." (p. 79) In *Williams v. Spencer*, 150 Mass. 346, the testimony was not only confined to attesting witnesses but to the opinion which they formed when the will was executed.

⁴ *In re Carmichael*, 36 Ala. 514, 522,

citing numerous earlier Alabama cases; *Turney v. Torrey*, 100 Ala. 157.

⁵ *Abraham v. Wilkins*, 17 Ark. 292, 322.

⁶ *Taylor's Estate*, 92 Cal. 564. Under the statute the opinion of an intimate acquaintance is competent evidence, the reason for the opinion being given: Code Civ. Proc. § 1870, pl. 10. See *In re Carpenter*, 79 Cal. 382; s. c. 94 Cal. 406.

⁷ *Shanley's Appeal*, 62 Conn. 325; *Dunham's Appeal*, 27 Conn. 192. In this State a witness so giving his opinion cannot be compelled to give his opinion on a hypothetical case to test the value of his opinion (p. 200).

⁸ *Duffield v. Morris*, 2 Harr. 375, 385.

⁹ *Walker v. Walker*, 14 Ga. 242, 251, relying on *Potts v. House*, 6 Ga. 324.

¹⁰ *Craig v. Southard*, 148 Ill. 37, 47; *Keithley v. Stafford*, 126 Ill. 507, 520; *American Bible Society v. Price*, 115 Ill. 623, 642; *Roe v. Taylor*, 45 Ill. 485, disclaiming a contrary view ascribed to *Van Horn v. Keenan*, 28 Ill. 445, 449.

¹¹ *Leach v. Prebster*, 39 Ind. 492, 494; *State v. Newlin*, 69 Ind. 108, 112; *Cline v. Lindsey*, 110 Ind. 337, 341; *Buckhart v. Gladish*, 123 Ind. 337, 345.

¹² *Pelamourges v. Clark*, 9 Iowa, 1, 12; *Severin v. Zack*, 55 Iowa, 28, 31; *Parsons v. Parsons*, 66 Iowa, 754, 759; *Norman's Will*, 72 Iowa, 84; *Meeker v. Meeker*, 74 Iowa, 352. The court, however, may first rule, whether the fact stated by the witness lay any foundation for an opinion: *Denning v. Butcher*, 91 Iowa, 425.

which their opinion is grounded. Kentucky,¹ Maryland,² Michigan,³ Minnesota,⁴ Missouri,⁵ New Hampshire,⁶ New Jersey,⁷ New York,⁸ * North Carolina,⁹ Ohio,¹⁰ Pennsylvania,¹¹ [* 42] Tennessee,¹² Texas,¹³ Vermont,¹⁴ Virginia,¹⁵ and West Virginia.¹⁶ In South Carolina it is intimated that only subscribing witnesses can give their opinion.¹⁷ Subscribing witnesses are not generally

¹ *Hunt v. Hunt*, 3 B. Mon. 575, 577. It is necessary to be shown that the non-expert had opportunity to form such opinion, but if that is shown his opinion is admissible, though he cannot state the specific facts showing sanity or insanity: *Newcomb v. Newcomb*, 96 Ky. 120.

² *Weems v. Weems*, 19 Md. 334, 345.

³ *Beaubien v. Cicotte*, 12 Mich. 459, 495, *et seq.*; *Rice v. Rice*, 50 Mich. 448. But it is for the court to say whether there is any basis shown by the testimony of the witness, upon which he could give an opinion: *Prentiss v. Bates*, 93 Mich. 234, 241; see also *O'Connor v. Madison*, 98 Mich. 183.

⁴ *Pinney's Will*, 27 Minn. 280, 281; *Layman's Will*, 40 Minn. 371.

⁵ *Moore v. Moore*, 67 Mo. 192, 195, relying on *Baldwine v. The State*, 12 Mo. 223, and *Crowe v. Peters*, 63 Mo. 429, 434.

⁶ *Hardy v. Merrill*, 56 N. H. 227, reviewing the history of the contrary doctrine and overruling *Hamblett v. Hamblett*, 6 N. H. 333, 349; *Boardman v. Woodman*, 47 N. H. 120, 135.

⁷ *Turner v. Cheesman*, 15 N. J. Eq. 243. But the New Jersey cases (*Sloan v. Maxwell*, 3 N. J. Eq. 563, *Whitenack v. Stryker*, 2 N. J. Eq. 8, *Lowe v. Williamson*, 2 N. J. Eq. 82, *Garrison v. Garrison*, 15 N. J. Eq. 266) all give very little weight to such opinions: the court draws its own conclusions and forms its own judgment from the premises which have produced the conviction in the mind of the witness; see also *Clifton v. Clifton*, 47 N. J. Eq. 227.

⁸ *Culver v. Haslam*, 7 Barb. 314, affirmed in *DeWitt v. Barley*, 13 Barb. 550, 551; but witnesses who did not subscribe the will are confined to their conclusions from the facts to which they testify; and they are not permitted to testify as to their opinion of the testator's sanity, but only whether the acts testified to were rational or irrational; attesting witnesses

may give their opinion generally: *Wyse v. Wyse*, 155 N. Y. 367, and numerous cases cited; *Clapp v. Fullerton*, 34 N. Y. 190, 194, *et seq.*; In the Matter of *Ross*, 87 N. Y. 514, 520, citing *Hewlett v. Wood*, 55 N. Y. 634.

⁹ *Clary v. Clary*, 2 Ired. L. 78, 80.

¹⁰ *Clark v. State*, 12 Ohio, 483, 492. But see *Runyan v. Price*, 15 Ohio St. 1, 14, in which the court held that a witness could not be allowed to state his opinion as to the sanity or insanity of a testator, or his capacity to make a will, at the time he was called upon to witness the will, for two reasons: one of which was stated to be that the inquiry involved a question of law and fact, and the very question to be decided by the jury, and assumed that the witness knew the degree of capacity which the law required for the performance of the act of executing a will.

¹¹ *Shaver v. McCarthy*, 110 Pa. St. 339, 346; *Titlow v. Titlow*, 54 Pa. St. 216, 223; *Bricker v. Lightner*, 40 Pa. St. 199, 205; *Pidcock v. Potter*, 68 Pa. St. 342, 351.

¹² *Gibson v. Gibson*, 9 Yerg. 329, holding that the opinions of non-experts (not subscribing witnesses), considered merely as opinions, are not evidence, but may be given after stating the appearance, conduct, or conversation of testator, or other fact from which his mind may be inferred (p. 332); *Puryear v. Reese*, 6 Coldw. 21, 26.

¹³ *Denson v. Beazley*, 34 Tex. 191, 212; *Brown v. Mitchell*, 75 Tex. 9, 15; s. c. 88 Tex. 350, 358.

¹⁴ *Cram v. Cram*, 33 Vt. 15, 18, *et seq.*; *Foster v. Dickerson*, 64 Vt. 233. See also *Fairchild v. Bascom*, 35 Vt. 398.

¹⁵ *Burton v. Scott*, 3 Rand. 399, 403 *et seq.*; *Young v. Barner*, 27 Gratt. 96, 103, *et seq.*

¹⁶ *Kerr v. Lunsford*, 31 W. Va. 659, 678.

¹⁷ *Jeter v. Tucker*, 1 S. C. 245, 254.

required to state the facts upon which they base their opinion;¹ but their testimony is not conclusive,² although entitled to the greatest regard.³ But a distinction is drawn between the admissibility of the witnesses' opinion of the testator's mental condition as to sanity or insanity, or the like, which, it is said, are allowed by nearly all the authorities, and such opinions when directed to the question of legal *capacity* to perform the act in question, which is a question of law upon which no witness may express an opinion.⁴

But not subscribing witnesses.

§ 29. **Incapacity from Imbecility.**— Mere imbecility or weakness of mind, whether natural or brought on by old age, epilepsy or similar diseases, habitual drunkenness, or any other cause, does not, as has already appeared,⁵ deprive a person of testamentary capacity.⁶ [* 43] * It seems that extreme old age in a testator is deemed by the courts a circumstance calling for their vigilance,⁷ but by itself constitutes no testamentary disqualification.⁸ Yet imbecility, though not amounting to actual insanity, may

Old age.

¹ *Titlow v. Titlow*, 54 Pa. St. 216, 223; *Gibson v. Gibson*, 9 Yerg. 329, 332; *Van Huss v. Rainbolt*, 2 Coldw. 139; *Williams v. Lee*, 47 Md. 321, 325.

² *McTaggart v. Thompson*, 14 Pa. St. 149, 154; at least not in solemn probate: *Mays v. Mays*, 114 Mo. 536. See, on the effect of the testimony of subscribing witnesses, *post*, § 218.

³ *Harrison v. Rowan*, 3 Wash. C. C. 580, 586; *Stevens v. Vancleve*, 4 Wash. C. C. 262, 268; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Shaver v. McCarthy*, 110 Pa. St. 339, 347. But in Connecticut it is held that the evidence of attesting witnesses to testator's capacity is not entitled to special consideration merely because they are attesting witnesses: *Crandall's Appeal*, 63 Conn. 365.

⁴ *Brown v. Mitchell*, 88 Tex. 350, 358, *et seq.*, discussing principle and authorities *pro* and *con*; *Kempsey v. McGinnis*, 21 Mich. 123, 141; *Blood's Will*, 62 Vt. 359, 364; *Schneider v. Manning*, 121 Ill. 376, 386.

⁵ *Ante*, § 25.

⁶ "For courts cannot measure the size of people's understandings and capacities, nor examine into the wisdom or prudence of men in disposing of their estates": *Wms. Ex.* [40], citing *Osmond v. Fitzroy*, 3 P. Wms. 129. See also *Reed's Will*, 2 B. Mon. 79; *Bleecker v. Lynch*, 1 Bradf. 458, 470; *Elliot's Will*, 2 J. J. Marsh. 340, 342; *Dornick v. Reichenback*, 10 Serg. &

R. 84, 90; *Blanchard v. Nestle*, 3 Denio, 37, 40; *Crolius v. Stark*, 64 Barb. 112, 117; *Thompson v. Kyner*, 65 Pa. St. 368, 378; *Rutherford v. Morris*, 77 Ill. 397, holding that even softening of the brain two years prior to the making of the will will not invalidate it, if the testator at the time of making it was capable of transacting his ordinary business affairs (p. 408 *et seq.*); *Wintemute v. Wilson*, 28 N. J. Eq. 437 (affirming *Wintemute's Will*, 27 N. J. Eq. 447); *Chrisman v. Chrisman*, 16 Oreg. 127.

⁷ *Collins v. Townley*, 21 N. J. Eq. 353, in which the age of the testatrix (ninety-eight years) was held to warrant a demand for full formal proof of the will; *Weir v. Fitzgerald*, 2 Bradf. 42, 64; *Cuthbertson's Appeal*, 97 Pa. St. 163, affirming *Boyd v. Boyd*, 66 Pa. St. 283; *Will of Ames*, 51 Iowa, 596, 604.

⁸ "On the contrary, it calls for protection and aid to further its wishes, when a mind capable of acting rationally, and a memory sufficient in essentials, are shown to have existed": *Maverick v. Reynolds*, 2 Bradf. 360, 384. See also *Pooler v. Christman*, 145 Ill. 405, 410; *Watson v. Watson*, 2 B. Mon. 74; *Creely v. Ostrander*, 3 Bradf. 107; *Reynolds v. Root*, 62 Barb. 250, 253; *Van Alst v. Hunter*, 5 Johns. Ch. 148, 158; *Van Huss v. Rainbolt*, 2 Coldw. 139, 142; *Thomas v. Stump*, 62 Mo. 275, 279; *Browne v. Molliston*, 3 Whart. 129, 137; *Sloan v. Maxwell*,

Imbecility may invalidate will. be shown to exist to an extent which invalidates the will,¹ as where he has not sufficient mind to comprehend the nature and effect of the act he was performing, or the relation he held to the various individuals who might naturally be expected to become objects of his bounty, or to be capable of making a rational selection among them.² Senile dementia may so far impair the mind that "a man in his old age becomes a very child again in his understanding, and so forgetful that he knows not his own name;" such a person has obviously no more testamentary capacity "than a natural fool, or a child, or a lunatic."³ It must be remembered, however, that a lower degree of intellectual vigor is necessary, or held sufficient, to make a valid will, than is required to sustain a contract.⁴ Total loss of memory, or * the loss of [*44] memory of the testator's family or property, is fatal to the validity of the will;⁵ but if memory is not

3 N. J. Eq. 563, 581; *Den v. Johnson*, 5 N. J. L. 454, 457, *et seq.*; *Humphrey's Will*, 26 N. J. Eq. 513; *Wilson v. Mitchell*, 101 Pa. St. 495, 503; *Smith v. James*, 34 N. W. R. (Io.) 309; *Napple's Estate*, 134 Pa. St. 492, 494; *Kerr v. Lansford*, 31 W. Va. 659, 679.

¹ *McTaggart v. Thompson*, 14 Pa. St. 149, 154; *Shropshire v. Reno*, 5 J. J. Marsh. 91, 92; *Den v. Vancleve*, 5 N. J. L. 589, 660, *et seq.*; *Holden v. Meadows*, 31 Wis. 284, 296; *Hyatt v. Lunnin*, 1 Dem. 14.

² *Forman v. Swift*, 7 Lans. 443, 446; *Daniel v. Daniel*, 39 Pa. St. 191, 207; *Bates v. Bates*, 27 Iowa, 110, 116; *Bundy v. McKnight*, 48 Ind. 502, 513, *et seq.*

³ 1 Redf. on Wills, 98, pl. 6, quoting from the "Orphan's Legacy" by Godolphin, and citing *Griffiths v. Robins*, 3 Madd. 191, turning on a deed of gift; *Mackenzie v. Handasyde*, 2 Hagg. Eccl. 211, 218; and *Potts v. House*, 6 Ga. 324.

⁴ "A man may be capable of making a will and yet incapable of making a contract, or to manage his estate": *Harrison v. Rowan*, 3 Wash. C. C. 580, 586; *Greene v. Greene*, 145 Ill. 264, 275; *Taylor v. Cox*, 153 Ill. 220; *Maddox v. Maddox*, 114 Mo. 35; *Meeker v. Meeker*, 74 Iowa, 352; *Gardner v. Lamback*, 47 Ga. 133, 192; *Turner v. Cheesman*, 15 N. J. Eq. 243, 256; *Kinne v. Kinne*, 9 Conn. 102, 105; *Converse v. Converse*, 21 Vt. 168; *Hovey v. Chase*, 52 Me. 304, 314; *Brinkman v. Rueggessick*, 71 Mo. 553, 555; *Wise*

v. Foote, 81 Ky. 10, 15; *Whitney v. Twombly*, 136 Mass. 145.

In the case of *Harvey v. Sullens*, 46 Mo. 147, 153, an instruction to the jury, that if the testatrix at the time of executing the will was "old and infirm in body and feeble and childish in mind, and so incapable of transacting her ordinary business, then she had not sufficient capacity to make a will," was held to be justified "under the circumstances here presented," but the court say that as an abstract proposition of law it would not be quite accurate. The proposition that, "if one be able to transact the ordinary affairs of life, he may, of course, execute a valid will," is approved, and the cases of *Tomkins v. Tomkins*, 1 Bail. 92, and *Coleman v. Robertson*, 17 Ala. 84, cited in support thereof (p. 154). The principle announced in the syllabus of the case (p. 148), that persons incapable of transacting ordinary business are incapable of making a will, is not, therefore, an accurate statement of the principle announced by the court. In *Young v. Ridenbaugh*, 67 Mo. 574, 586, the testamentary capacity required is stated to be an understanding of the disposition the testator wishes to make of his property, and whether the will makes that disposition.

⁵ *Yoe v. McCord*, 74 Ill. 33, 39; *Turner v. Cheesman*, 15 N. J. Eq. 243, 256; *Converse v. Converse*, 21 Vt. 168, in which Judge Redfield says that the testator "must undoubtedly retain sufficient active memory to collect in his mind, without

totally lost, the fact that it is poor or impaired does not affect the testatory capacity,¹ for the mind may be sound, although the memory be impaired.² It has been held that want of memory, vacillation of purpose, credulity, and vagueness of thought may all exist in connection with testamentary capacity;³ and "there is no rule of law which prescribes average capacity for a testamentary act."⁴

§ 30. **Incapacity in Consequence of Force, Fraud, or Intimidation** — A will coerced by actual force employed upon the testator,⁵ or by threats and intimidations,⁶ or obtained in consequence [* 45] * of fraud perpetrated upon him,⁷ is self-evidently void, because it is not his spontaneous act or free will. For the same reason, the law does not recognize that as a valid testamentary act which is the result of external influence brought to bear upon the testator to an extent and under circumstances which overpower his free will.⁸ Out

Force, threats, intimidation, or fraud invalidate will.

Undue influence.

prompting, particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them" (p. 170); *Delafield v. Parish*, 25 N. Y. 9, 29; *Aikin v. Weckerly*, 19 Mich. 482, 506; *Lamb v. Lamb*, 105 Ind. 456, 462.

¹ See cases *supra*, note 5; *Taylor v. Pegram*, 151 Ill. 106; *Eddy's Case*, 32 N. J. Eq. 701; *Wilson v. Mitchell*, 101 Pa. St. 495, 505; *Montague v. Allan*, 78 Va. 592.

² *Lowder v. Lowder*, 58 Ind. 538, 542. "If the testator was of sound mind, but of poor or impaired memory, he was of sound mind *and* memory, as the phrase is known in the law": *Yoe v. McCord*, 74 Ill. 33, 39.

³ *Hopple's Estate*, 13 Phila. 259.

⁴ *Per Cooley, J.*, in *Hoban v. Piquette*, 52 Mich. 346, 361.

⁵ *Mountain v. Bennett*, 1 Cox Ch. C. 353, 355.

⁶ "Imaginary terrors may have been created sufficient to deprive him of free agency." "The conduct of a person in vigorous health towards one feeble in body, even though not unsound of mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed": *Boyse v. Rossborough*, 6 H. L. Cas. 2, 49. See *Will of Farnsworth*, *infra*.

⁷ *Davis v. Calvert*, 5 Gill & J. 269, 303;

Dietrick v. Dietrick, 5 Serg. & R. 207 (including as fraudulent unfounded imputations against those entitled to the testator's bounty); *Will of Farnsworth*, 62 Wis. 474; but the mistake of the testator as to a fact, unless occasioned by fraudulent or deceptive representations, does not invalidate a will: *Howell v. Troutman*, 8 Jones L. 304, 307; *aliter*, if the beneficiary, possessing the confidence of the testatrix, knowingly permits her to make a will under a false impression: *Greenwood v. Cline*, 7 Or. 17.

⁸ *Lord Cranworth*, in the case of *Boyse v. Rossborough*, *supra*, points out that it is not metaphysically accurate to predicate want of will of a person acting under coercion. He illustrates by arguing that *it is the will of the traveller* to give up his purse when threatened with death by the highwayman in case of refusal, and that *it is the will of the owner* to give up his horse to the thief who steals it under the fraudulent pretence of borrowing it, and adds: "But the law deals with the case as if they had been obtained against my will, my will having been the result in one case of fear, and in the other of fraud. The same principle must guide us in determining whether an instrument duly executed in point of form is or is not a will. The inquiries must be . . . was the instrument in question the expression of his genuine will, or was it the expression of a will created in his mind by coercion or fraud?" 6 H. L. Cas. 44, 45.

of this principle springs a prolific source of litigation between heirs at law and beneficiaries of testators; and no subject affords greater scope to juries for the indulgence of personal opinions and views of right and wrong, because no general rule can be laid down to ascertain the extent and nature of the influence under which a testator may have acted, or, where this is ascertained, to determine whether and to what extent such influence was legitimate or unlawful.¹

§ 31. **Incapacity arising from Undue Influence.**— Undue influence, to vitiate a will, must be such as caused the testator to *dispose of his property contrary [* 46] to his judgment or desire,² in consequence of fraudulent representations³ or importunities and external pressure which he was too weak to resist,⁴ and hence always contains an element of coercion or fraud destroying free agency;⁵ if his judgment was not misled by false representations, nor his will overpowered by irresistible importunities,

¹ "To make a good will, a man must be a free agent. But all influences are not unlawful. Persuasion — appeals to the affections, or ties of kindred — to a sentiment of gratitude for past services, or pity for future destitution, or the like — these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or hopes, if so exerted as to overpower volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats such as the testator has not the courage to resist — moral command asserted and yielded to for the sake of peace and quiet; or of escaping from distress of mind or social discomfort, — these if carried to a degree in which the free play of the testator's judgment, discretion, or wish is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, but not driven; and his will must be the offspring of his own volition, but not the record of some one else's": Hall v. Hall, 37 L. J. P. 40.

² *Forney v. Ferrell*, 4 W. Va. 729; *Leverett v. Carlisle*, 19 Ala. 80; *Marx v. McGlynn*, 88 N. Y. 357; *Sunderland v. Hood*, 13 Mo. App. 232; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577, 581; *Marshall v. Flinn*, 4 Jones L. 199, 204; *Mitchell v. Mitchell*, 43 Minn. 73; *Seebrock v. Fedowa*, 30 Neb. 424, 438.

³ To invalidate a will on the ground of false representations to the testator it must be proved that such representations were made, that they are false, and that the disposition in the will was made in consequence thereof; but it is not necessary to prove that the representations were made in bad faith for the purpose of procuring the will: *Smith v. Du Bose*, 78 Ga. 413. See *ante*, § 30 (p. * 45, note 1).

⁴ *Kinleside v. Harrison*, 2 Phillim. 449, 551; *Chandler v. Ferris*, 1 Harr. (Del.) 454, 464, *et seq.*; *Taylor v. Wilburn*, 20 Mo. 306, 309; *Brick v. Brick*, 66 N. Y. 144, 149; *Layman v. Conrey*, 60 Md. 286, 292; *Will of Farnsworth*, 62 Wis. 474; *Maynard v. Vinton*, 59 Mich. 139; *Schofield v. Walker*, 58 Mich. 96, 106; *Waddington v. Busby*, 45 N. J. Eq. 173, 175, 176; *Grove v. Spiker*, 72 Md. 300; *McFadin v. Catron*, 138 Mo. 197.

⁵ *Williams v. Goude*, 1 Hagg. 577, 581; *Gardiner v. Gardiner*, 34 N. Y. 155; *Gaither v. Gaither*, 20 Ga. 709; *Stackhouse v. Horton*, 15 N. J. Eq. 202, 231; *Westcott v. Sheppard*, 51 N. J. Eq. 315; *Knox v. Knox*, 95 Ala. 475; *Herster v. Herster*, 122 Pa. St. 239; *In re Wilson*, 117 Cal. 262; *Riley v. Sherwood*, 45 S. W. R. (Mo.) 1077, 1080; *Jackson v. Hardin*, 83 Mo. 175, 185; *Higgins v. Carlton*, 28 Md. 115; *Children's Aid Society v. Loveridge*, 70 N. Y. 387, 394; *Potter's Appeal*, 53 Mich. 106, 113. In *Stewart v. Elliott*, 2 Mackey, 307, 319, it is held that undue influence may exist in the absence of fraud.

no influence brought to bear upon him can invalidate his will, because it is in such case free from the element of coercion or fraud.¹ No precise line can be drawn distinguishing legitimate from unlawful influence, except the general one thus indicated;² but it is held that considerations addressed to a testator's good feelings, simply influencing his better judgment;³ the earnest solicitations of a wife,⁴ or the exercise of influence springing from family relations, or from motives of duty, affection, or gratitude;⁵ persuasion, argument, or flattery;⁶ kindness [* 47] *and attentions to the testator;⁷ and influence worthily exerted for the benefit of others⁸ cannot be considered as "undue," so as to affect the validity of a will inspired thereby. The mere opportunity to exercise influence over a testator does not, even in connection with an unjust will, warrant the presumption of undue influence, in the absence of affirmative evidence of its exercise, where the testator's mind is unimpaired, and he understood the contents of his will.⁹

What is not undue influence.

Opportunity to influence does not warrant presumption of undue influence.

¹ *Simmerman v. Songer*, 29 Gratt. 9, 24; *Shailer v. Bumstead*, 99 Mass. 112, 121, *et seq.*; *In re Kaufman*, 117 Cal. 288; *Latham v. Udell*, 38 Mich. 238; *Allmon v. Pigg*, 82 Ill. 149; *Munroe v. Barclay*, 17 Ohio St. 302, 314, *et seq.*; *Parramore v. Taylor*, 11 Gratt. 220, 239; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577, 590.

² *Boyse v. Rossborough*, 6 H. L. Cas. 2, 47; *Lynch v. Clements*, 24 N. J. Eq. 431, 434; *Maynard v. Vinton*, 59 Mich. 139, 153.

³ *Tucker v. Field*, 5 Redf. 139; *Potts v. House*, 6 Ga. 324, 359; *Wise v. Foote*, 81 Ky. 10, 15.

⁴ *Rankin v. Rankin*, 61 Mo. 295, 300; *Small v. Small*, 4 Me. 220; *Jackman's Will*, 26 Wis. 104, 116; *Stulz v. Schaeffle*, 18 Eng. L. & E. 576; *Langford's Estate*, 108 Cal. 608.

⁵ *Wait v. Breeze*, 18 Hun. 403, 404; *Hall v. Hall*, L. R. 1 Prob. & Div. 481, 482; *Rutherford v. Morris*, 77 Ill. 397, 412; *Matter of Mondorf*, 110 N. Y. 450, 456; *Hughes v. Murtha*, 32 N. J. Eq. 288; *Pierce v. Pierce*, 38 Mich. 412; *Barnes v. Barnes*, 66 Me. 286, 297; *McCulloch v. Campbell*, 49 Ark. 367, 371; *McFadin v. Catron*, 138 Mo. 197; *Thompson v. Ish*, 99 Mo. 160, 182; *Bevelot v. Lestrode*, 153 Ill. 625.

⁶ *Potts v. House*, 6 Ga. 324, 359; *Chandler v. Ferris*, 1 Harr. 454, 464;

Eastis v. Montgomery, 93 Ala. 293; *O'Neill v. Farr*, 1 Rich. 80, 84; *McDaniel v. Crosby*, 19 Ark. 533, 551; *McIntire v. McConn*, 28 Iowa, 480, 486; *Schofield v. Walker*, 58 Mich. 96, 106; *Bush v. Lisle*, 89 Ky. 393.

⁷ *Miller v. Miller*, 3 Serg. & R. 267, 270; *Lowe v. Williamson*, 2 N. J. Eq. 82, 88; *Den v. Gibbons*, 22 N. J. L. 117, 158; *Gleespin's Will*, 26 N. J. Eq. 523, 527; *Rogers v. Diamond*, 13 Ark. 474, 483; *Eddy's Case*, 32 N. J. Eq. 701, 708; *Wilson's Appeal*, 99 Pa. St. 545, 551; *McCoy v. McCoy*, 4 Redf. 54, 60; *Kerr v. Lunsford*, 31 W. Va. 659, 680.

⁸ *Harrison's Will*, 1 B. Mon. 351, 352; *Creely v. Ostrander*, 3 Bradf. 107, 112; *Tawney v. Long*, 76 Pa. St. 106, 115. "The influence must be specially directed toward procuring a will in favor of particular parties": *McCulloch v. Campbell*, 49 Ark. 367, 371.

⁹ *McCoy v. McCoy*, 4 Redf. 54, 60; *Hoban v. Piquette*, 52 Mich. 346, 364. (But see *Demmert v. Schnell*, 4 Redf. 409, as to what opportunities were held, by another surrogate, to raise the presumption of undue influence.) *Estate of Brooks*, 54 Cal. 471, 474; *Hubbard v. Hubbard*, 7 Or. 42, 47; *In re Martin*, 98 N. Y. 193, 197; *Blake v. Rourke*, 74 Iowa, 519; *Maddox v. Maddox*, 114 Mo. 135; *McFadin v. Catron*, 138 Mo. 197; *Hess'*

What degree of influence will vitiate a will depends much upon the bodily and mental vigor of the testator, for that which would overwhelm a mind weakened by sickness, dissipation, or age might prove no influence at all to one of strong mind in the vigor of life.¹ The question to be decided is, whether the testator had intelligence enough to detect the fraud, and strength of will enough to resist the influence brought to bear upon him.²

Influence is never presumed (except in the case to be considered below, between attorney and client, or where the legatee sustained a fiduciary relation to the testator), but must always be proved by the party alleging it;³ not generally, but as a present constraint operating at the time of executing the will,⁴ hence the ratification of a will drawn under undue influence, when the influence has been removed, cancels the objection to the validity of the will on that ground.⁵ The proof must exclude the * hypothe- [* 48] sis of the testator's acting upon his own free will,⁶ which, like other facts, may be proved circumstantially.⁷ The contents of the

Will, 48 Minn. 504; Nelson's Will, 39 Minn. 204, 208. See, also, *infra*, p. * 48, note 5.

¹ Haydock v. Haydock, 33 N. J. Eq. 494; Myers v. Hanger, 98 Mo. 433, 438; Westcott v. Sheppard, 51 N. J. Eq. 315, 320.

² Robinson, J., in Griffith v. Dufferderfer, 50 Md. 466, 480.

³ Jones v. Roberts, 37 Mo. App. 163, 174; Humphrey's Will, 26 N. J. Eq. 513, 521; Ewen v. Perrine, 5 Redf. 640; Davis v. Davis, 123 Mass. 590, 597; Webber v. Sullivan, 58 Iowa, 260, 264; Armstrong v. Armstrong, 63 Wis. 162; McMaster v. Scriven, 85 Wis. 162; Carl v. Gabel, 120 Mo. 283, 298; Rockwell's Appeal, 54 Conn. 119.

⁴ Thompson v. Vigner, 65 Pa. St. 368, 379, citing earlier Pennsylvania cases; McMahon v. Ryan, 20 Pa. St. 329, 330; *In re Carpenter*, 94 Cal. 406, 412; Foster v. Dickerson, 64 Vt. 233, 265; *In re Kaufman*, 117 Cal. 288.

⁵ Taylor v. Kelly, 31 Ala. 59, 71. To similar effect see Shailer v. Bumstead, 99 Mass. 112, 125; O'Neill v. Farr, 1 Rich. 80, 89; and *contra*: Chaddick v. Haley, 81 Tex. 617, 619; Haines v. Hayden, 95 Mich. 332, 353. The ratification that might be inferred by testator's failure to alter or destroy the will when a long time

elapses between its execution and testator's death (*Hoshauer v. Hoshauer*, 26 Pa. St. 406) cannot be inferred where the will is shown not to have been in his possession during that time, coupled with other circumstances: *Barbour v. Moore*, 10 App. Dist. C. 30, 47.

⁶ Boyse v. Rossborough, 6 H. L. Cas. 2, 47; Maynard v. Vinton, 59 Mich. 139, 153; *In re McDevitt*, 95 Cal. 17. But an instruction to the jury that, "in order to set aside the will on the ground of undue influence, it must be shown that the circumstances of its execution are *inconsistent with any other hypothesis than such undue influence*" was held erroneous: *Gay v. Gillilan*, 92 Mo. 250, 257.

⁷ Reynolds v. Root, 62 Barb. 250; Beaubien v. Cicotte, 12 Mich. 459, 488; Smith v. Smith, 67 Vt. 443; Jackman's Will, 26 Wis. 104, 130; Denny v. Pinney, 60 Vt. 524; Primmer v. Primmer, 75 Iowa, 415, 418. "From the nature of the case, the evidence of undue influence will generally be circumstantial. It is not usually exercised openly, in the presence of others, so that it may be directly proved;" *per* Gilfillan, C. J., in Nelson's Will, 39 Minn. 204, 206; Tyler v. Gardiner, 35 N. Y. 559; Saunders' Appeal, 54 Conn. 108, 116; Herster v. Herster, 116 Pa. St. 612. Declarations of the testator

will,¹ or even of a prior revoked will,² may be considered in connection with the testator's disposition and affections, and declarations about it, as indicating whether there was extraneous influence; remembering, however, that the unnatural character of the will does not of itself prove undue influence.³ But gross inequality of distribution may be considered as a circumstance, though not of itself sufficient, to prove undue influence;⁴ and the unnatural character of the will, when supplemented by other suspicious circumstances, may throw the *onus* upon the favored beneficiary.⁵ So, also, the relations which the testator sustained toward the legatees may furnish indicia, and it is held that, unlike the influence arising from gratitude, affection, or esteem, or the kind offices of a wife or husband, or other person in the ordinary social relations of life, which are held lawful and proper, such influence arising from unlawful relations is undue and vitiates the will.⁶ That

May be proved by circumstances.

Inequality.

Testator's relations to legatees as evidence.

long before the making of the will are competent to explain preferences: *Dye v. Young*, 55 Iowa, 433; *Moore v. McDonald*, 68 Md. 321, 338. See also cases cited *post*, § 225, p. * 490.

¹ *Tyler v. Gardiner*, *supra*: *Allen v. Public Administrator*, 1 Bradf. 378, 386; *McLaughlin v. McDevitt*, 63 N. Y. 213, 217; *Denton v. Franklin*, 9 B. Mon. 28, 30; *Myers v. Hauger*, 98 Mo. 433, 438; *Beattie v. Thomasson*, 16 R. I. 13; *Potter v. Baldwin*, 133 Mass. 427, allowing declarations of the testator, both before and after the date of the will, to be given in evidence and citing *Shailer v. Bumstead*, 99 Mass. 112; *Lewis v. Mason*, 109 Mass. 169; and *May v. Bradlee*, 127 Mass. 414; *Parsons v. Parsons*, 66 Iowa, 754, 758; *Whitman v. Morey*, 63 N. H. 448; *Herster v. Herster*, 116 Pa. St. 612. Declarations by the testator are held admissible only when part of the *res gestæ*: see cases *post*, § 225, p. * 490.

² To show the then fixed purpose of the testator: *Thompson v. Ish*, 99 Mo. 160, 171. Even a mere draft or memorandum of a prior proposed will has been held admissible: *McConnell v. Wilder*, 153 Mass. 487.

³ *Kevil v. Kevil*, 2 Bush, 614; *Kitchell v. Beach*, 35 N. J. Eq. 446; *Webber v. Sullivan*, 58 Iowa, 260, 265; *Coffman v. Hedrick*, 32 W. Va. 119, 132. *In re Wilson*, 117 Cal. 262. Says Clark, J., in *Herster v. Herster*, 122 Pa. St. 239, 260: "The very object of making a will is to disturb

the equality of distribution; it is only when the will is grossly unreasonable in its provisions, and plainly inconsistent with the testator's duty to his family that, in case of doubt, the inequality can have any effect on the question of undue influence."

⁴ *Pooler v. Cristman*, 145 Ill. 405; *Nicewander v. Nicewander*, 151 Ill. 156; *McFadin v. Catron*, 120 Mo. 252, 273; *Maddox v. Maddox*, 114 Mo. 35.

⁵ *Gay v. Gillilan*, 92 Mo. 250, 254, as explained in the subsequent Missouri cases above cited.

⁶ *Denton v. Franklin*, 9 B. Mon. 28; *Dean v. Negley*, 41 Pa. St. 312, 317; *Rudy v. Ulrich*, 69 Pa. St. 177, 181; *McClure v. McClure*, 86 Tenn. 173 (holding, however, that where the parties believe the relation to be lawful, no unfavorable inference should be drawn), 178; *Kessinger v. Kessinger*, 37 Ind. 341, 343. See also *Reichenbach v. Ruddach*, 127 Pa. St. 564, 593. But the existence of the relation is not itself proof, nor does it give rise to a presumption of undue influence: *Main v. Ryder*, 84 Pa. St. 217, 225; *Johnson's Estate*, 159 Pa. St. 630; *Farr v. Thompson*, *Cheves*, 37, 48; *Roe v. Taylor*, 45 Ill. 485; *Sunderland v. Hood*, 84 Mo. 293, affirming s. c. 13 Mo. App. 232, 236, *et seq.*: *Wainwright's Appeal*, 89 Pa. St. 220, 226; *Donnelly's Will*, 68 Iowa, 126; *Porschett v. Porschett*, 82 Ky. 93; *Matter of Mondorf*, 110 N. Y. 450. And the rule making a distinction as to the source of the "unlawful" influence was criticised in *Matter of*

a portion of the testator's estate is bequeathed in violation of the terms of a family settlement does not, in the absence of proof of fraud or undue influence, vitiate the will; the rights of parties affected may be enforced on the distribution of the estate.¹

* § 32. **Presumption against Legacies to Fiduciary Ad- [* 49]**

visers.—The rule that undue influence may never be presumed, but must be proved by the person who alleges it, is subject to an exception in those cases in which a legacy is given by a testator to his attorney, confidential adviser, guardian, or other person sus-

taining toward him any fiduciary relation. Proof of the existence of such relation raises the presumption of undue influence, which is fatal to the bequest unless rebutted by proof of full deliberation and spontaneity on the part of the testator, and good faith on the part of the legatee.² The presumption extends beyond the period of

minority in the case of guardian and ward, so as to invalidate a will made by a person in favor of his former guardian a few days after attaining majority;³ and a bequest to the wife of a guardian likewise gives rise to the presumption, where it appears that the guardian may expect and derive substantial advantage and benefit from such will of his ward.⁴ It is held to be the

duty of a priest acting as confessor and adviser of a testator about to will his property to a stranger in blood, to make inquiries touching his family relations, and disinterestedly advise him as to his duties to wife and children, and that a failure to do so avoids a gift or testamentary donation, although it be not to the donee's personal benefit, but "in the interest of religion" and for "his spiritual welfare."⁵ The principle avoiding such gifts cannot be evaded by giving interests to third persons, instead of those who exercise the undue influence.⁶ In some of the cases in which

Ruffino, 116 Cal. 305, 316, in which the court holds that "it makes no difference what the moral qualities of the influence may be," the question being whether the proposed will is the spontaneous act of a competent testator.

¹ Schaaber's Appeal, 13 Atl. R. (Pa.) 775.

² Meek v. Perry, 36 Miss. 190, 244, *et seq.*, citing numerous English and American authorities; St. Leger's Will, 34 Conn. 434, 450; Wilson v. Moran, 3 Bradf. 172, 180; Jones v. Roberts, 37 Mo. App. 163, 174; Bridwell v. Swank, 84 Mo. 455, 467; Finegan v. Theissen, 92 Mich. 173, 184; Harvey v. Sullens, 46 Mo. 147, 154; Watterson v. Watterson, 1 Head, 1; Morris v. Stokes, 21 Ga. 552, 573; *In re Welsh*, 1 Redf. 238, 245. See also Rich-

mond's Appeal, 59 Conn. 226; Drake's Appeal, 45 Conn. 9, 18.

³ Garvin v. Williams, 44 Mo. 465, 469, *et seq.*; s. c. 50 Mo. 206.

⁴ Bridwell v. Swank, 84 Mo. 455.

⁵ Ford v. Hennessey, 70 Mo. 580, 587, *et seq.*, citing Kirwan v. Cullen, 4 Irish Ch. (n. s.) 322, 326 (sustaining a gift *inter vivos* in trust); Thompson v. Heffernan, 4 Drury & W. 285, 291 (a *donatio mortis causa* held void); and Houghton v. Houghton, 15 Beav. 278, 299 (avoiding a deed of resettlement of family estates between a father and his eldest son, executed soon after the son attained majority); Marx v. McGlynn, 88 N. Y. 357, 371; see also Finegan v. Theissen, 92 Mich. 173, 184; and Hegney v. Head, 126 Mo. 619.

⁶ Ford v. Hennessey, *supra*, citing

wills were held void by reason of undue influence exerted on the testators, courts seem reluctant to announce as a rule that where a legacy is given to a confidential adviser or fiduciary, the burden of proof is on the beneficiary, contenting themselves with the statement that such relation is a circumstance of suspicion, requiring clear evidence of the testator's knowledge of and assent to the contents of the will, independent of its formal execution, and usually dwell on the mental weakness of the testator or similar accompanying facts.¹ And in some States the principle above announced, so far as it applies to wills, is modified to the extent that the mere fact that a gift is made to one standing in a fiduciary relation (no matter how close), while being a suspicious circumstance calling for jealous scrutiny, is of itself insufficient to presumptively invalidate such gift; there must be coupled therewith some act of the beneficiary, however slight (depending on the circumstances) in some way connecting him with the will.²

[* 50] *A similar rule of law prevails, where the person who prepares the instrument or conducts its execution is himself benefited by its provisions; very clear proof of volition and capacity, as well as of knowledge by the testator of the contents, is necessary in such case to the validity of the instrument.³ But if the beneficiary writing the will is a near relative, who

Yosti v. Laughran, 49 Mo. 594, 599, and *Ranken v. Patton*, 65 Mo. 378, 390, *et seq.*; *Drake's Appeal*, 45 Conn. 9, 18.

¹ *Yardley v. Cuthbertson*, 108 Pa. St. 395, 456, *et seq.*, citing English and American cases; *Harrison's Appeal*, 100 Pa. St. 458, 469; *Cuthbertson's Appeal*, 97 Pa. St. 168; *Barry v. Butlin*, 1 Curt. 637; *Armors Estate*, 154 Pa. St. 517; *McCommon v. McCommon*, 151 Ill. 428.

² *Bancroft v. Otis*, 91 Ala. 279, 286, reviewing English and American authorities and overruling prior Alabama cases on this point; *per Handy, J.*, dissenting, in *Meek v. Perry*, 36 Miss. 190, 269; *Griffith v. Diffenderfer*, 50 Md. 466, 483; *per Andrews, J.*, in *Matter of Smith*, 95 N. Y. 516, 523; *Bennett v. Bennett*, 50 N. J. Eq. 439; *Denning v. Butcher*, 91 Iowa, 425, declaring this to be the better rule, and citing many cases: 439 *et seq.*

³ *Wms. on Ex.* [112], citing English and American authorities; *Garrett v. Heflin*, 98 Ala. 615; *Post v. Mason*, 91 N. Y. 539. It is said in this case, by *Danforth, J.*, "the relation of attorney and draughtsman no doubt gave, in the case before us, the opportunity for influence, and self-interest might supply a motive to unduly

exert it; but its exercise cannot be presumed in aid of those who seek to overthrow a will already established by the judgment of a competent tribunal, rendered in proceedings to which the plaintiffs were themselves parties, nor in the absence of evidence warrant a presumption that the intention of the testator was improperly, much less fraudulently, controlled." So in *Coffin v. Coffin*, 23 N. Y. 9, 13, it is held that the mere fact that the draughtsman is a legatee is insufficient without other indications of undue influence to presumptively invalidate the legacy, and that such relation "is, at most, a suspicious circumstance, of more or less weight, according to the facts of each particular case," etc., quoting from *Barry v. Butlin*, 1 Curt. (Ecl.) 637, 640. See to same effect, *Stirling v. Stirling*, 64 Md. 138, 147; *Cramer v. Crumbaugh*, 3 Md. 491, 499, 503; *Carter v. Dixon*, 69 Ga. 82, 89; *Berberet v. Berberet*, 131 Mo. 399. See also *Crispell v. Dubois*, 4 Barb. 393, 398; *Caldwell v. Anderson*, 104 Pa. St. 199; *Yardley v. Cuthbertson*, 15 Phila. 77; *s. c.* 108 Pa. St. 395, 456, *et seq.*; *Purdy v. Hall*, 134 Ill. 298, 308. It makes no difference that the will, having been

would take a considerable share of the estate if there were no will, the presumption which might arise against a stranger is not applicable to him.¹ The appointment of the scrivener as executor is not sufficient to require affirmative proof that the paper was drawn in accordance with the instructions of the testator, or that he is aware of its contents and legal effect.²

§ 33. **Presumption as to Seamen's Wills.**—A similar exception to the ordinary rules and presumptions by which the intention of testators is to be ascertained is made in the case of seamen,³ whose temporary necessities are considered to operate upon them as a sort of duress on the part

Similar presumption in case of the will of seamen.

*of those who are to furnish the supply.⁴ It [*51] was therefore held, that, although the statute⁵ provides "that no will of any seaman contained, printed, or written *in the same instrument*, paper or parchment, with a warrant or letter of attorney, shall be good or available in law to any intent or purpose whatsoever," yet a will was invalid when executed *on a different instrument* from the power of attorney.⁶ Neither the relation of agent and seaman, nor the indebtedness of the seaman to his agent, operates as an absolute defeasance of the will; but there must be clear proof in such cases of the subscription of the deceased to the instrument, and of his knowledge of its nature and effect: if executed *merely* as a security for a debt, it shall not operate as a testamentary disposition of the whole property; but if there be satisfactory evidence of an intention to dispose of the property by will, the instrument shall be valid although there be a debt.⁷

§ 34. **Partial Avoidance of Will by Undue Influence.**—If undue influence or fraud, though exercised by one legatee only, affect the whole will, the whole will is void;⁸ but both justice and policy require

written by the beneficiary, is subsequently copied by another: *Kelly v. Settegast*, 68 Tex. 13, 20. So when any beneficiary has the testator completely under his control, with power to make his will the will of the testator, especially in case of an unnatural disposition of the property, undue influence is presumed: *Carrall v. House*, 48 N. J. Eq. 269.

¹ *Caldwell v. Anderson*, 104 Pa. St. 199, 206. But even in such case, when the evidence shows that the will was not read by the testator, nor explained to him, the burden of showing that the will was drawn as directed by the testator is on the beneficiary: *Blume v. Hartman*, 115 Pa. St. 32.

² *Linton's Appeal*, 104 Pa. St. 228, 237; *Livingston's Appeal*, 63 Conn. 68, 78.

³ "It is the policy of the law of this

country," says Sir John Nicholl in the case of *Zacharias v. Collis*, 3 Phil. 176, "and of several others, to grant special indulgences, and to extend special protections to the testamentary intentions of this class of persons."

⁴ Wms. Ex. [51].

⁵ 9 & 10 Will. III. c. 41, § 6; repealed and re-enacted by 55 Geo. III. c. 60, § 4; also 1 & 2 Geo. IV. c. 49, § 2; and see 11 Geo. IV., and 1 Will. IV. c. 20, §§ 48 *et seq.*; 28 & 29 Vict. c. 72, § 4.

⁶ *Zacharias v. Collis*, 3 Phillim. 176, citing *Craig v. Lester*, p. 189; also *Moore v. Smart*, p. 190; *Hay v. Mullo*, p. 194; *Forbes v. Burt*, p. 196.

⁷ Wms. Ex. [53], citing *Zacharias v. Collis*, *supra*, and *Deardsley v. Fleming*, 2 Cas. Temp. Lee, 98.

⁸ *Florey v. Florey*, 24 Ala. 241, 248.

that the rejection of a legacy obtained by fraud or undue influence should not invalidate other provisions in the same will in favor of legatees who have not resorted to improper means.¹ For the like reason, an erasure or alteration in the will, though found to have been made after execution, does not avoid the will *in toto*; if made by a stranger, and the original legacy be known, it will have no legal effect, the legacy will be still recoverable, and ought to be proved as it originally stood; but if made by the legatee himself, it will avoid the legacy so altered, but cannot destroy other bequests in the will, either to such legatee or others.² Hence a will may be valid as to some of its dis- [* 52] positions, and * invalid as to others. This doctrine will be further considered in connection with the probate of wills.³

A will may be avoided in part and sustained in part.

§ 35. **Wills of Deaf, Dumb, and Blind Persons.** — The imperfections of deaf, dumb, and blind persons, although in no wise inconsistent with perfect testamentary capacity, demand special precautions in the proof of their wills. Persons *born* deaf, blind, and dumb were by Blackstone classed with “those who are incapable, by reason of mental disability, to make a will.” Surrogate Bradford points out⁴ that this rule — borrowed from the civil law, which itself allowed the testatory power where these defects were not congenital — must of necessity be qualified by the reason of it, which was a presumed want of capacity.⁵ If, therefore, a person, although deaf, dumb, and blind, have received such education as to endow him with ordinary intellectual powers, he may make a valid will;⁶ *a fortiori*, where the person is blind, but not deaf and dumb,⁷ or deaf and dumb, but not blind.⁸ In all such cases it is necessary to prove, to the entire satisfaction of the court or jury passing upon the validity of the will, that the testator was acquainted with its contents.⁹ It is not necessary, ordinarily, to prove that the will was read by or to the testator before executing it;¹⁰ but if evi-

Wills of deaf, dumb, and blind persons not necessarily void.

But strict proof must be made.

¹ *In re Welsh*, 1 Redf. 238, 247; *Baker's Will*, 2 Redf. 179, 197; *Harrison's Appeal*, 48 Conn. 202, 204.

² *Smith v. Fenner*, 1 Gall. C. C. 170, 174; *Camp v. Shaw*, 52 Ill. App. 241, 249. As to interlineations, see *post*, § 49.

³ *Post*, § 222.

⁴ In the case of *Weir v. Fitzgerald*, 2 Bradf. 42, 68.

⁵ “. . . who, as they have always wanted the common inlets of understanding, are incapable of having *animus testandi*, and their testaments are therefore void”: 2 Bla. Comm. 497.

⁶ *Reynolds v. Reynolds*, 1 Speers, 253, 257.

⁷ *Ray v. Hill*, 3 Strobb. L. 297, 302; *Wilson v. Mitchell*, 101 Pa. St. 495.

⁸ *Gombault v. Public Administrator*, 4 Bradf. 226, 230; *Matter of Perego*, 65 Hun, 478.

⁹ *Davis v. Rogers*, 1 Houst. 44, 93.

¹⁰ Because, as a general rule, the person signing an instrument is presumed to know its contents: *Androscoggin Bank v. Kimball*, 10 Cush. 373, 374; which rule applies to wills as well as to other instruments: *Munnikhuysen v. Magraw*, 35 Md. 280, 287; *Downey v. Murphy*, 1 Dev. & B. L. 82, 87.

dence be given that the testator was blind, or could not read, or, for any reason, was unacquainted with its contents, such evidence must be met by satisfactory proof, either that the will was read to or by, or that the contents were known to, the testator.¹ Modern authorities go no further than to require very great scrutiny, in such cases, into the testator's knowledge and approval of the contents of the will;² and "it is *almost superfluous to observe, that, [*53] in proportion as the infirmities of a testator expose him to deception, it becomes imperatively the duty, and should be anxiously the care, of all persons assisting in the testamentary transaction, to be prepared with the clearest proof that no imposition has been practised."³

¹ *Harrison v. Rowan*, 3 Wash. C. C. 580, 585; *Wampler v. Wampler*, 9 Md. 540, 550; *Martin v. Mitchell*, 28 Ga. 382, 385; *Guthrie v. Price*, 23 Ark. 396, 403, *et seq.*; *Day v. Day*, 3 N. J. Eq. 549, 552.

² Bigelow's note 1 to 1 Jarm. on Wills, *34, b., p. 46.

³ 1 Jarm. on Wills, *34, Bigelow's note (1); 1 Redf. on Wills, 58.

[* 54]

* CHAPTER V.

FORM, EXECUTION, AND ATTESTATION OF WILLS.

§ 36. **Absolute and Conditional Wills.** — The office of a will — more accurately called *last* will or testament — is to control the disposition, in the manner desired by the testator, of his property after his death, and, in many of the States,¹ as under the statute of 12 Car. II. c. 24, to appoint a guardian for his minor children.² In its essential nature a will is ambulatory, for it is not operative before the testator's death, until which time it can vest no rights in others, and may therefore be revoked or changed at the testator's pleasure.³ It is usually absolute in its provisions, but may be made conditional upon the happening of some event, and is then void unless such event happen.⁴ In such case it is important to ascertain, first, whether the intention of the testator is to make the validity of the will dependent upon the condition, or merely to state the circumstances inducing him to make the testamentary provision; and next, whether, if the language clearly imports a condition, it apply to the whole will, or affect only some part of it.⁵ The case of *French v. French*⁶ presents some instructive features on this question, and may with profit be noticed *in extenso*. The will was a holograph, in the following form: "Let

Office of wills.

They are ambulatory;

usually absolute, but may be conditional.

Case illustrating distinction between absolute and conditional will.

[* 55] all men know hereby, if * I get drowned this morning, March 7, 1872, that I bequeath all my property, personal and real,

¹ In all of them except Iowa and Nebraska, in the statutes of which no provisions to this effect have been met with. The power is given in all cases to the father, in many of them also to the surviving mother, and in two or three States the power to the father is conditioned upon the consent of the mother. In Maine, New Hampshire, and Ohio, the testamentary appointment operates only if held suitable by the probate court.

² *Balch v. Smith*, 12 N. H. 437, 440; See the subject of testamentary guardians treated in *Woerner on Guardianship*, § 20.

³ See *infra*, § 37. An instrument vest-

ing rights upon delivery, enforceable by the parties, is a contract *inter vivos*, and not revoked by a subsequent will: *Book v. Book*, 104 Pa. St. 240.

⁴ 1 Jarm. on Wills, * 17 *et seq.*; *Morrow's Appeal*, 116 Pa. St. 440; *Maxwell v. Maxwell*, 3 Metc. (Ky.) 101, 104; *Jacks v. Henderson*, 1 Desaus. 543, 554.

⁵ *Damon v. Damon*, 8 Allen, 192, 194, *et seq.*; *Tarver v. Tarver*, 9 Pet. 174, 179; *Ex parte Lindsay*, 2 Bradf. 204, 206; *Thompson v. Conner*, 3 Bradf. 366; *Kelleher v. Kernan*, 60 Md. 440; *Likefield v. Likefield*, 82 Ky. 589.

⁶ 14 W. Va. 458.

to my beloved wife, Florence. Witness my hand and seal, 7th of March, 1872. Wm. T. French." It was proved, on the propounding of the will, that French was about to cross a deep river; that his wife, being afraid that some accident would happen, was anxious that he should not go; that decedent started out of the room, and then came back and wrote the will. It also appeared in the cause¹ that French had no children; that he was not drowned on the day of writing the will, but died on the 29th of December, 1874; that if he had died on the day of the date of said will, his wife would have been the sole legal heir of her husband; but that after that day, and before the day of his death, the law of descent was so amended that the father of the deceased was his sole legal heir. It was also proved in the proceeding to set aside the probate of said will that the testator subsequently recognized the writing as a valid will; but the court held such testimony inadmissible.¹ Upon these facts the majority of the court, after an extensive review of English and American authorities bearing upon the question of contingent wills,² reached the conclusion that "it was the intention and purpose of the decedent that said paper writing should be his unconditional will and testament, giving to his wife Florence all of his real and personal estate at his death, whether natural or otherwise; and the court, in order to give effect to the intention of the decedent, will presume that said paper writing was executed in contemplation of any change of the law of descents as to legal heirship which might be and was made between the date of the said will and the death of the decedent."³ The president of the court dissented, holding it to be self-evident that the words of the will, "*if I get drowned,*" &c., could not possibly mean "*as I may get drowned,*" &c.⁴ Four of the five judges concurred in the majority opinion, rendered by Haymon, J.

* § 37. **Joint and Mutual Wills.** — It follows from the ambu- [* 56]

Rule as to
joint or mutual
wills.

latory quality of wills, that a testator cannot by will deprive himself of his power to revoke a testamentary disposition.⁵ It is therefore said that the conjoint

¹ Page 506 of the opinion.

² Mentioning, as holding wills absolute because the contingencies were therein mentioned as inducements, *Cody v. Conly*, 27 Gratt. 313; *Goods of Dobson*, 1 P. & D. (L. R.) 88; *Goods of Martin*, 1 P. & D. (L. R.) 380; *Thorne's Case*, 4 Sw. & Tr. 36; *Skipwith v. Cabell*, 19 Gratt. 758; and as holding wills conditional and void because the contingency did not happen, *Parsons v. Lanoe*, 1 Ves. Sen. 189; *Ingram v. Strong*, 2 Phillim. 294; *Jacks v. Henderson*, *supra*; *Sinclair v. Hone*, 6 Ves. 607; *Wagner v. McDonald*, 2 Harr. & J.

346; *Todd's Will*, 2 Watts & S. 145; *Maxwell v. Maxwell*, *supra*; *Dougherty v. Dougherty*, 4 Metc. (Ky.) 25; *McGee v. McNeil*, 41 Miss. 17; *Robnett v. Ashlock*, 49 Mo. 171.

³ Page 503 of the opinion.

⁴ Page 507.

⁵ "The making of a will is but the inception of it, and it doth not take any effect till the death of the deviser; for *omne testament' morte consummat' est, et voluntas est ambulatoria usque ad extremum vite exitum*. Then it would be against the nature of a will to be so absolute that

will of several testators cannot be admitted to probate, as being unknown to the testamentary law.¹ Jarman, in the earlier editions of his work on Wills, inclines to this view;² but in the last edition he announces that two or more persons may make a joint will, which, if properly executed by each, is, so far as his own property is concerned, as much his will, and is as well entitled to probate upon the death of each, as if he had made a separate will.³ It seems clear that if two or more persons join in making a will, or make mutual wills dependent upon each other, so that the mutual wills or joint will of all becomes a joint transaction, each of the testators may, by exercising his power of revocation, destroy the testamentary character or validity of the instrument, at least, to the extent of his interest therein.⁴ This follows from the revocability of wills. But in so far as a joint or mutual will may rest upon a mutual agreement, according to which the execution of the instrument by one is the condition or consideration for its execution by another, the element of contract is superadded to the transaction; and, as a contract, the instrument is of course irrevocable without the consent of all the parties to it.⁵ In this sense, the law making a will based upon a valuable consideration binding as a contract is fully applicable.⁶ Hence, if one of the parties [* 57] to a joint or mutual will * die without having revoked it, and the survivor benefit thereby, the will may be enforced in equity, as a compact, against revocation by the survivor.⁷ The doctrine announced by Jarman in the later editions seems, therefore, incontrovertible on principle, and is sanctioned by the current of English and American decisions. It asserts the revocability of joint and mutual wills as testamentary dispositions of property, and there-

May be admitted to probate

if not revoked by any of the testators.

But if revoked as a will, it may be enforced as a contract.

he who makes it, being of good and perfect memory, cannot countermand it": *Ferse & Hembling's Case*, 4 Co. 16 b.

¹ *Clayton v. Liverman*, 2 Dev. & B. L. 558; *Hobson v. Blackburn*, 1 Add. 274, 277; *Walker v. Walker*, 14 Oh. St. 157; *Hershey v. Clark*, 35 Ark. 17, 23.

² So in *Perkins's 2d American edition* (1849), where he says: "A joint or mutual will is said to be unknown to the testamentary law of England. . . . However, such a will may, it should seem, in some cases, be enforced in equity as a compact": 1 *Jarm. on Wills*, 27 (2d Am. ed.).

³ 1 *Jarm. (Bigelow's 5th American from the 4th English edition)*, *18.

⁴ *Hobson v. Blackburn*, 1 Add. 274; *Walpole v. Oxford*, 3 Ves. 402, 415.

It is provided in the Code of Georgia

(Code, 1882, § 2470) that even in case of mutual wills with a covenant against revocation, the power of revocation remains.

⁵ *Schouler on Wills*, § 455. But to attribute to a will the quality of irrevocability demands the most indisputable evidence of the agreement which is relied upon to change its ambulatory nature, and presumptions growing out of the similarity of cross provisions, identity of purpose, etc., are insufficient to supply proof that the parties intended to execute mutual wills irrevocably binding themselves and their estates: *Edson v. Parsons*, 155 N. Y. 555, 565, 568.

⁶ *Infra*, p. *58.

⁷ *Story Eq. § 785*; *Dufour v. Pereira*, 1 Dick. 419; *Carmichael v. Carmichael*, 72 Mich. 76, 85.

fore entitled to probate as such, to be consistent with their irrevocability as contracts, and therefore enforceable in equity if broken by

Joint will may be admitted to probate on death of testator first dying.

the revocation of the testamentary disposition.¹ Accordingly, if by two mutual wills, or in a joint will, two testators will their respective estates to the survivor of them, without further testamentary disposition,

the will of the one who first dies (which is the joint will) is entitled to probate, and the survivor may then dispose of the property devised at pleasure, for the will has fully accomplished its office, and made the property his.² But if a joint will contains provisions

Joint devise to third parties takes effect after death of last surviving testator.

for other purposes, or legacies to other persons, it cannot take effect as to such until it receive probate upon the death of the last surviving testator.³ Surrogate Bradford, in discussing this question, points out that the decision of Sir John Nicholl in *Hobson v. Black-*

burn has been misconceived; that, instead of deciding that a compact of a testamentary character could not be proved as a will because it was a mutual or conjoint act, he only held that such an instrument could not be set up as irrevocable against a subsequent will revoking it; and he also shows that this ruling is in harmony with the civil law.⁴ And the Supreme Court of Ohio * have [* 58] expressly disavowed *Walker v. Walker*,⁵ in so far as the decision of that case indicates the policy of Ohio to be opposed to joint wills, and affirmatively hold that several persons may dispose of their property by joint will, being in effect the will of each, revocable by each, and subject to probate, either severally upon the death of each testator, as his will, or jointly after the death of all, as the will of each and all of them.⁶ But in Connecticut it was held that a joint will, which was not to receive probate until after the death of the survivor, in which the property owned in common by the

¹ *In re Davis*, 120 N. C. 9 (overruling *Clayton v. Liverman*, *supra*); *Keep in re*, 1 Connoly, 104; *Gould v. Mansfield*, 103 Mass. 408; *Edson v. Parsons*, 155 N. Y. 355, 366; *Izard v. Middleton*, 1 Desaus. 116; *Wyche v. Clapp*, 43 Tex. 543, 548; *March v. Huyter*, 50 Tex. 243, 252; *Breathitt v. Whittaker*, 8 B. Mon. 530, 534; see also *Sumner v. Crane*, 155 Mass. 483, and *Towle v. Wood*, 60 N. H. 434 (announcing such to be the law, although the will was held void for want of the required formalities of execution).

² The joint will, in such cases, is but the will of the testator who dies first: *Lewis v. Scofield*, 26 Conn. 452, 454; *Evans v. Smith*, 28 Ga. 98, 104; *Schumaker v. Schmidt*, 44 Ala. 454, 464; *In res Diez*, 50 N. Y. 88, 92; *Ex parte Day*,

1 Bradf. 476; *Bynum v. Bynum*, 11 Ired. L. 632, 637; *Cowley's Estate*, 136 Pa. St. 628.

³ *Schumaker v. Schmidt*, *supra*; *Goods of Raine*, 1 Sw. & Tr. 144; *Goods of Lovegrove*, 2 Sw. & Tr. 453, 455; *Black v. Richards*, 95 Ind. 184, 189.

⁴ *Ex parte Day*, 1 Bradf. 476, 482, quoting from *Passmore v. Passmore*, 1 Phillim. 216; *Masterman v. Maberly*, 2 Hagg. 235; *Domat*, pt. 2, lib. 3, tit. 1. See also *Goods of Stracey, Dea.* & Sw. 6; *Rogers, Appellant*, 11 Me. 303, 305; *In re Davis*, 120 N. C. 9.

⁵ 14 Oh. St. 157.

⁶ *Betts v. Harper*, 39 Oh. St. 639, citing numerous authorities to similar effect. See also *Hill v. Harding*, 92 Ky. 76.

testators was disposed of, and provided for the payment of the debts of each testator, as well as legacies to third persons in excess of the interest of each testator, was illegal, and that on the death of the first testator his property was to be distributed as intestate estate.¹

The will of a husband and wife, though joint in form, is not a joint will, if the property devised belongs to the husband or wife only;² and where such a will is contingent, it is void if the contingency does not happen.³ But where husband and wife had joint power to devise, and had executed it by joint will, neither of them can revoke the joint will so made by a separate will.⁴

In Louisiana mutual and joint wills are prohibited by statute;⁵ in Georgia the power of revoking mutual wills is secured by statute, even if there be a covenant in such will against revocation.⁶

It may be worth while to mention, in this connection, the equitable principle, that where an instrument, though clearly testamentary in form and phraseology, is executed on a valuable consideration, it constitutes an irrevocable contract, which a court of equity will, as near as may be possible, specifically enforce;⁷ and this although the agreement was by parol, if not avoided by the Statute of Frauds.⁸ So, also, a binding agreement between a testator and his heir at law will be enforced, although repudiated by his will.⁹ It is well settled that a contract to make a certain provision by will for a particular person is [* 59] valid if founded on a sufficient consideration;¹⁰ * an action will lie for the breach thereof,¹¹ or for a balance due, if pro-

Wills upon a consideration may be enforced in equity if revoked.

¹ *State Bank v. Bliss*, 67 Conn. 317, relying on *Walker v. Walker*, *supra*.

² *Rogers*, Appellant, *supra*; *Kunnen v. Zurline*, 2 Cin. 440, 447; *Allen v. Allen*, 28 Kan. 18, 24. A will signed by husband and wife, but which the latter did not sign *animo testandi*, but only to evidence her consent to the disposition made, is the will of the husband alone: *Chaney v. Home Soc.*, 28 Ill. App. 621.

³ *Goods of Hugo*, L. R. 2 P. D. 73.

⁴ *Breathitt v. Whittaker*, 8 B. Mon. 530, 534.

⁵ *Voorhies' Rev. C.* 1889, art. 1574. But this prohibition does not extend to the wills of husband and wife, or of any two persons, in favor of the same beneficiary, although written out by the same party on the same day, if separately attested: *Wood v. Roane*, 35 La. An. 865, 869. But see 12 La. An. 880.

⁶ Code, 1882, § 2470.

⁷ *Johnson v. Hubbell*, 10 N. J. Eq. 332, 335; *Rivers v. Rivers*, 3 Desaus. 190,

194; *Wright v. Tinsley*, 30 Mo. 389, 396; *Parsell v. Stryker*, 41 N. Y. 480, 485; *Bolman v. Overall*, 80 Ala. 451, 454; and see cases *infra*.

⁸ *Shakespeare v. Markham*, 10 Hun, 311, 322; *Bolman v. Overall*, *supra*; *Clark, J.*, in *Burgess v. Burgess*, 109 Pa. St. 312, 316; *Hoffman's Estate*, 161 Pa. St. 331.

⁹ *Taylor v. Mitchell*, 87 Pa. St. 518; see also *Meck's Appeal*, 97 Pa. St. 313, 316.

¹⁰ *Wellington v. Aphthorp*, 145 Mass. 69, 72; *Caviness v. Rushton*, 101 Ind. 500; *Bird v. Pope*, 73 Mich. 483; *McKeigan v. O'Neil*, 22 S. C. 454, 467; *Newton v. Newton*, 46 Minn. 33; if there is no sufficient consideration, the promise is unenforceable: *Drake v. Lanning*, 49 N. J. Eq. 452.

¹¹ *Jenkins v. Stetson*, 9 Allen, 128, 132; *Starkey's Appeal*, 61 Conn. 199; *Koch v. Hebel*, 32 Mo. App. 103, 110; *Purviance v. Shultz*, 16 Ind. App. 94, 95.

vision is made in part only;¹ or specific performance may be decreed;² and if the action for specific performance is defeated by the Statute of Frauds, an action on the *quantum meruit* is maintainable to recover for the services rendered.³ While services rendered on a mere expectation of a legacy do not constitute a good cause of action,⁴ yet an action lies for the breach of a promise to pay for services by a legacy,⁵ or devise.⁶ And where services are rendered by a son, under the general expectation of compensation by will or otherwise, the mode being left in the judgment of the father, the son is

¹ Reynolds v. Robinson, 64 N. Y. 589, 594.

² Parsell v. Stryker, 41 N. Y. 480, 485; Mauck v. Melton, 64 Ind. 414; Newton v. Newton, 46 Minn. 33 (declaring one to be equitable owner of property which the testator had agreed to bequeath him, but failed) 36; Kofka v. Kosicky, 41 Neb. 328 (holding likewise); Fogle v. Church, 48 S. C. 86 (asserting the same remedy of decreeing the disappointed devisee to be the equitable owner); Pfluger v. Pultz, 43 N. J. Eq. 440; Sharkey v. McDermott, 91 Mo. 647; Crofut v. Layton, 68 Conn. 91 (where testator made a conditional legacy instead of an absolute one, as he had contracted to do). In Kansas it seems to be held that specific performance will not be decreed if the value of the services forming the consideration for such promise can be easily computed: Hazleton v. Reed, 46 Kans. 73. So where specific performance would be inequitable: Fuchs v. Fuchs, 48 Mo. App. 18. As to what constitutes sufficient part performance to avoid the Statute of Frauds, see cases cited and commented on in Shahan v. Swan, 48 Oh. St. 25, 39, and Hale v. Hale, 90 Va. 728; Swash v. Sharpstein, 14 Wash. 426 (holding that the verbal contract to devise is void, unless the *decedent* has done some act of part performance, though valuable rights may have been relinquished by the intended devisee in consideration of the contract). So in Massachusetts, where the statute requires such a contract to be in writing, an oral contract cannot be enforced, even if the plaintiff has furnished the stipulated consideration: Emery v. Burbank, 163 Mass. 326. To same effect: Dieken v. McKinley, 163 Ill. 318 (holding a verbal agreement to devise land, or to make no will depriving an heir of his share, to be void, and that part performance did not make the contract enforceable

unless the promisee took possession under the contract). See Nowack v. Berger, 133 Mo. 24, holding that on principle marriage constitutes such part performance as will avoid the defence of the statute, and discussing the cases *pro* and *con* on this question. In a New York case the court went to the length of holding that an injunction would lie against the probate of a will different from a prior one made in pursuance of a valid contract: Cobb v. Hanford, 88 Hun, 21.

³ Miller v. Eldridge, 126 Ind. 461, 465; Wallace v. Long, 105 Ind. 522, citing and commenting on numerous cases; Ellis v. Cary, 74 Wis. 176, 187; Grant v. Grant, 63 Conn. 530.

⁴ Miller's Estate, 136 Pa. St. 239. The evidence of a promise should be direct and positive: King's Estate, 150 Pa. St. 143; Sloniger v. Sloniger, 161 Ill. 270.

⁵ Schutt v. Missionary Society, 41 N. J. Eq. 115; Clark v. Cardry, 69 Mo. App. 6; Schwab v. Pierre, 43 Minn. 520 (allowing recovery on a *quantum meruit*), 523; Hudson v. Hudson, 87 Ga. 678 (recovery on *quantum meruit*, the promisor becoming insane, and hence incapable of making a will); *In re Williams' Estate*, 106 Mich. 490. In such cases the Statute of Limitations begins to run from the death of the promisor: Stone v. Todd, 49 N. J. L. 274, 280; Manning v. Pippen, 86 Ala. 357; Kauss v. Rohner, 172 Pa. St. 481; Cann v. Cann, 40 W. Va. 138, 157, in which Holt, J., cites many cases. Numerous cases on this and cognate points are collected by the reporter in a note to Pfluger v. Pultz, 43 N. J. Eq. 440.

⁶ Roehl v. Haumesser, 114 Ind. 311, holding that a contract in general terms to devise "one-half of my estate" is not void for the want of a more certain description.

bound by any provision made by the father, whether satisfactory or not.¹ It has been held, that a contract to leave all one's property at one's death to an adopted child would not restrain such person from disposing of his property in his lifetime.² But a contract to adopt may, on a proper showing, be specifically enforced against the promisor's administrator.³

§ 38. **General Rules as to the Form of Wills.**—It is unimportant to notice, in this connection, the various solemnities and formalities required in different countries and at various times to make a valid will or testament, because this matter is regulated by statute in each State, as well as in England, and will be considered at the proper time. But it is necessary to bear in mind the distinction between

Common law and statutes of 32 Hen. VIII. and 29 Car. II. affecting wills.

personal and real property in connection with its testamentary disposition,⁴ and that, while at common law real estate could not be devised, the power of making a will of personal property existed in England from the earliest period of its law.⁵ The power to devise lands, after the Conquest, was first granted, in England, by the statute of 32 Henry VIII., from which and that of 29 Car. II. the American statutes regulating devises are substantially taken.⁶ Although both in England and America the formalities required to vindicate the validity of wills of both real and personal property are now prescribed by statute,⁷ yet the distinction existing between legacies (gifts of personal property) and devises (of real estate) at

the time of the enactment of the several statutes is not wholly [*60] obliterated; and the common law *rules on the subject of wills remain in force as the law of most States, in so far as they are not abrogated by American legislation. It is necessary, therefore, briefly to review the common law in this respect, before considering the provisions of American statutes.⁸

At common law,⁹ no particular form is necessary to constitute a

¹ Lee's Appeal, 53 Conn. 363.

² Austin v. Davis, 128 Ind. 472; Van Dyne v. Vreeland, 12 N. J. Eq. 142.

³ Healy v. Simpson, 113 Mo. 340. It was held in Nowack v. Berger, 133 Mo. 24, that a marriage is such part performance of a parol antenuptial contract made in consideration thereof, to adopt the infant son by a former marriage of the woman and make him the promisor's heir, as will take it out of the Statute of Frauds; in Dicken v. McKinley, 163 Ill. 318, it is held that a verbal contract to devise in consideration of adoption is not enforceable under the Statute of Frauds though the adoption was legally consummated. See, also, as to services performed on expecta-

tion of inheriting as an adopted child, Wright v. Wright, 99 Mich. 170, and cases cited; and Quinn v. Quinn, 5 S. Dak. 328.

⁴ Ante, §§ 12 et seq.

⁵ Wms. Ex. 1.

⁶ 4 Kent Comm. 504 et seq.

⁷ In England, by the statute of 1 Vict. c. 26.

⁸ See ante, §§ 15 et seq., on the influence of the feudal tenure of lands on the American law.

⁹ Or rather under the ecclesiastical law of England, for wills of personal estate were cognizable exclusively in the spiritual or other testamentary courts.

valid will of personalty; and the same is true of all wills in America, save as modified by statute.¹ It is equally valid, whether written in the language used in the forum, or in a foreign tongue;² if in a foreign language, it should be interpreted by persons skilled in the rules of interpreting wills in the country in whose language it is written.³ A will duly executed, with knowledge of its contents, is valid, though never read by the testator,⁴ or written in a language unknown to him.⁵ Nor is it important that its language or phraseology should be technically appropriate to its testamentary character; it is sufficient that the instrument, however irregular in form or inartificial in expression, disclose the intention of the testator respecting the post-mortuary disposition of his property.⁶ It may operate as a valid will although drawn in the form of a deed-poll or an indenture,⁷ or a deed of gift,⁸ a warranty deed,⁹ a bond,¹⁰ marriage settlements,¹¹ letters,¹² drafts on bankers,¹³ *the assignment of a bond, note, [*61] bill, or stocks, by indorsement,¹⁴ promissory notes

No particular form required at common law or under American statutes.

Equally valid whether in English or foreign tongue.

Phraseology unimportant.

Deed or indenture, bond, marriage settlement, letter, draft, assignment, promis-

¹ "The legislature has power to prescribe the formalities to be observed in the execution of a will; and by so doing does not interfere with the rights of an individual to dispose of his property as he sees fit": *McCabe's Estate*, 68 Cal. 519. And the technical mandates of the statute must be complied with, as the courts cannot consider, in respect of the execution of a will, the intention of the testator or attesting witnesses, but only the intention of the legislature: *In re Walker*, 110 Cal. 387; *per Bartlett, J.*, in *Matter of Whitney*, 153 N. Y. 259, 264.

² *Reynolds v. Kortwright*, 18 Beav. 417, 426; *Caulfield v. Sullivan*, 85 N. Y. 153.

³ *Foubert v. De Cresseron*, Show. P. C. 194, 197; *Caulfield v. Sullivan*, *supra*.

⁴ *Worthington v. Klemm*, 144 Mass. 167.

⁵ *Walter's Will*, 64 Wis. 487.

⁶ *Mitchell v. Donohue*, 100 Cal. 202; *Allen v. McFarland*, 150 Ill. 455; *Alston v. Davis*, 118 N. C. 202; *Fosselman v. Elder*, 98 Pa. St. 159, 160, 168; *Meck's Appeal*, distinguishing between a contract *inter vivos*, although the price for land conveyed was payable after the grantor's death, and a testamentary disposition: 97 Pa. St. 313, 316.

⁷ *Habergham v. Vincent*, 2 Ves. Jr. 204,

231, 235; *Sperber v. Balster*, 66 Ga. 317; *Miller v. Holt*, 68 Mo. 584, 587.

⁸ *Will of Belcher*, 66 N. C. 51, 53; *Crocker v. Smith*, 94 Ala. 295; *Jordan v. Jordan*, 65 Ala. 301, 305, and Alabama cases cited; *Turner v. Scott*, 51 Pa. St. 126; *Miller v. Holt*, 68 Mo. 584, 587.

⁹ *Lautenschlager v. Lautenschlager*, 80 Mich. 285.

¹⁰ *Masterman v. Maberly*, 2 Hagg. 235, 248.

¹¹ *Marnell v. Walton* (T. T. 1796), cited in *Masterman v. Maberly*, 2 Hagg. 247.

¹² *Leathers v. Greenacre*, 53 Me. 561, 565; *Scott's Estate*, 147 Pa. St. 89; *Fosselman v. Elder*, 98 Pa. St. 159, 161 (2 Am. Prob. Rep. 541), holding that a letter and the inscription on the envelope, together with a promissory note contained therein, constitute a valid testamentary disposition of the note operating as a codicil to the will; *Wagner v. McDonald*, 2 Harr. & J. 346; *Morrell v. Dickey*, 1 Johns. Ch. 153; *Byers v. Hoppe*, 61 Md. 206; *Alston v. Davis*, 118 N. C. 202. In California a letter and copy of a deed were together admitted as constituting a good holographic will: *In re Skerrett*, 67 Cal. 585.

¹³ *Bartholomew v. Henley*, 3 Phillim. 317; *Schad's Appeal*, 88 Pa. St. 111, 113.

¹⁴ *Hunt v. Hunt*, 4 N. H. 434, 438; *Musgrave v. Down* (T. T. 1784), and other

and notes payable by executors and administrators to evade the legacy duty,¹ a power of attorney;² it may be in part a deed or other contract, and in part a will;³ or it may be intended to operate as a deed, bond, or other instrument of gift, and yet, though inoperative as such, be valid as a will, if it provide for the disposition of property after death.⁴ It must not be understood, however, that any instrument is operative as a will which shows that there was no *animus testandi*;⁵ nor that, because it cannot operate in the form in which it is drawn, it should *for that reason* be operative as a will;⁶ it is essential, as already stated,⁷ that the instrument be made to depend upon the event of death for its consummation; for where a paper directs a benefit to be conferred *inter vivos*, without expressed or implied reference to the grantor's death, it cannot be established as testamentary.⁸

sory note, or power of attorney may constitute a valid will.

If written *animus testandi*.

To take effect after testator's death.

cases cited by Sir John Nicholl in 2 Hagg. 247; *Chaworth v. Beech*, 4 Ves. 556, 565.

¹ *Longstaff v. Rennison*, 1 Drew. 28, 35. In *Moore v. Stephens*, 97 Ind. 271, a paper reading "at my death, my estate shall pay to A. . . two hundred dollars," &c., was held testamentary in its character, and void for want of proper attestation; to same effect, *Cover v. Stem*, 67 Md. 449. The addition, however, of the words "value received" was in Delaware deemed sufficient to induce the court to regard the paper *prima facie* as a note: *Kirkpatrick v. Kirkpatrick*, 6 Houston, 569, 583. An instrument may be valid as a promissory note though not payable until a time certain after the maker's death: *Carnwright v. Gray*, 127 N. Y. 92; *Hageman v. Moon*, 131 N. Y. 462; so a purely voluntary covenant is valid as such, in which the executors of the obligor are to pay a sum of money within a certain time after his death: *Crell v. Codman*, 154 Mass. 454.

² *Rose v. Quick*, 30 Pa. St. 225.

³ *Robinson v. Schly*, 6 Ga. 515, 529; *Dudley v. Mallery*, 4 Ga. 52, 64; *Shepherd v. Nabors*, 6 Ala. 631, 636; *Dawson v. Dawson*, 2 Strobb. Eq. 34, 38; *Castor v. Jones*, 86 Ind. 289; *Reed v. Hazleton*, 37 Kans. 321.

⁴ *Crain v. Crain*, 21 Tex. 790, 796; and though acknowledged and recorded as a deed: *Hawes v. Nicholas*, 72 Tex. 481.

⁵ *Swett v. Boardman*, 1 Mass. 258, 262,

et seq.; *Combs v. Jolly*, 3 N. J. Eq. 625, 628; *Meade's Estate*, 118 Cal. 428.

⁶ *Cover v. Stem*, 67 Md. 449; *Edwards v. Smith*, 35 Miss. 197, 200. In *Travick v. Davis*, 85 Mo. 342, 345, it is said that "When it can have no effect as a deed, the court is inclined to regard it as a will, if in that character effect can be given to the evident intention of the maker. The controlling question is, whether the maker intended that an estate or interest should vest before his death. The reservation of a life estate does not of itself make it a will." See also *Nichols v. Emery*, 109 Cal. 323. Williams, in his treatise on Executors and Administrators, deduces from the authorities these rules: 1. That if it was the writer's intention to convey benefits which would be conveyed if the paper were a will, and that such conveyance should take effect only in case of his death, then, whatever be the form, it may be admitted to probate as testamentary. (*Singleton v. Breinar*, 4 McCord, 12, 14.) 2. That instruments in their terms dispositive are entitled to probate unless proved not to have been executed *animus testandi*, while such as are equivocal in character must be proved to have been executed *animus testandi*: *Wms. Ex.* [106], and authorities cited.

⁷ See *ante*, § 36.

⁸ *Wms. Ex.* [107], and authorities; *Wareham v. Sellers*, 9 Gill & J. 98; *Wheeler v. Durant*, 3 Rich. Eq. 452, 454,

May be written, printed, engraved, or lithographed.

Writing may be in pencil or in ink.

* A will may be written or printed, or partly [*62] written and partly printed, engraved, or lithographed.¹ Blank spaces left in the will do not necessarily invalidate it;² but it is better to avoid them, because they facilitate fraudulent interlineations.³ The writing may be in ink or in pencil;⁴ but when a question arises whether the testator intended the paper as testamentary, or merely preparatory to a more formal disposition, the material with which it is written becomes a most important circumstance,⁵ and the general presumption and probability is held to be, that, where alterations are made in pencil, they are deliberative; where in ink, they are final and absolute.⁶ But in Pennsylvania this presumption was denied, the court declaring that lead-pencil alterations in a will written in ink should be accorded the same effect as though they were in ink.⁷ A will written on a slate has been held void;⁸ but holographic entries in a diary,⁹ or an entry in an account-book, containing a full disposition of the property and appointment of an executor, dated eight months before the testatrix's death, subscribed and carefully preserved, was admitted to probate, although it contained the words, "I intend this as a sketch of my will, which I intend making on my return home."¹⁰ So a paper written and subscribed by the testator, with the intention of making it his will, thereby becomes his will, although he may not have deemed it a completed paper by reason of a mistaken notion that the law required a wit-

citing *Dawson v. Dawson*, Rice Eq. 243, and *Jaggers v. Estes*, 2 Strobh. Eq. 343; *Symmes v. Arnold*, 10 Ga. 506. See also *Book v. Book*, 104 Pa. St. 240. "If an instrument passes a present interest, although the right to its possession and enjoyment may not accrue until some future time, it is a deed or contract; but if the instrument does not pass an interest or right until the death of the maker, it is a will or testamentary paper": *Reed v. Hazleton*, 37 Kans. 321, 325; *Cover v. Stem*, 67 Md. 449; *Phillips v. Co.*, 94 Ky. 445; *Nichols v. Emery*, *supra* (in which a paper was held to be a valid deed, though there was a conveyance in trust, made revocable by the settlor, and a reservation to him of a life estate, and the conveyance was so made to avoid administration of his estate after his death).

¹ In the *Goods of Wotton*, L. R. 3 P. & D. 159, 160; 1 Jarm. on Wills, *18.

² *Corney v. Gibbons*, 1 Rob. 705, 708; In the *Goods of Kirby*, 1 Rob. 709; *Barnewall v. Murrell*, 108 Ala. 366, 385.

³ Where there was unnecessary and unreasonable space between the conclusion of the will and the testator's signature, it has been held not legally executed: *Soward v. Soward*, 1 Duv. 126, 134. See also *Tilghman v. Steuart*, in which two of the judges held the will valid, notwithstanding blank spaces left for names of legatees, but the majority held that they indicated that the *voluntas testandi* was not complete: 4 Harr. & J. 156, 172.

⁴ *Myers v. Vanderbelt*, 84 Pa. St. 510, 513; *Philbrick v. Spangler*, 15 La. An. 46.

⁵ *Patterson v. English*, 71 Pa. St. 454; *Kell v. Charmer*, 23 Beav. 195.

⁶ In the *Goods of Adams*, L. R. 2 P. & D. 367, 368; In the *Goods of Hall*, L. R. 2 P. & D. 256, 257. See also *Gardiner v. Gardiner*, 65 N. H. 230, 232.

⁷ *Tomlinson's Estate*, 133 Pa. St. 245.

⁸ *Reed v. Woodward*, 11 Phila. 541.

⁹ Although made at different times: *Reagan v. Stanley*, 11 Lea, 316.

¹⁰ *Hattatt v. Hattatt*, 4 Hagg. 211.

ness.¹ It must be remembered in this connection that before the enactment of the Wills Act (St. 1 Viet. c. 26) wills [* 63] *of personal estate in England needed neither witnesses to their publication,² nor signature,³ nor solemnity of any kind.⁴ The effect to be given to an extraneous paper sought to be incorporated in the will by reference therein is mentioned elsewhere.⁵

§ 39. **The Signature.**—Under the English Statute of Frauds all devises of lands and tenements were required to be in writing and signed by the party devising the same, or by some person in his presence and by his express direction. Will must be signed by testator. This provision is incorporated into the statutes regulating wills in nearly all the States,⁶ and a declaration is added in many of them, that unless so signed no will shall be valid. In Pennsylvania an exception is allowed where the testator is prevented from either signing or directing some other person to sign for him;⁷ and it is there held that, if a will be put in writing during the testator's lifetime, according to his directions, it will be held good without his signature, upon proof by two competent witnesses that he was prevented from signing under the circumstances mentioned in the statute.⁸ Where two persons, intending to make wills in favor of each other, and precisely alike, *mutatis mutandis*, each by mistake signs the other's intended will, there is no valid execution of either document.⁹

The making of a mark by the testator was held sufficient as a signature under the Statute of Frauds, without reference to the question whether he could write at the time;¹⁰ it is held equally sufficient under the Wills Act,¹¹ and in the several His mark is a good signature. States.¹² The mark of the testator has been held a proper signature, although the name was improperly written by the scrivener;¹³ a

¹ Toebbe v. Williams, 80 Ky. 661. This principle has, of course, validity in those States only in which holographic wills are held valid without being attested.

² Custody is a sufficient publication: Miller v. Brown, 2 Hagg. 209, 211.

³ Salmon v. Hays, 4 Hagg. 382, 385.

⁴ Wms. Ex. [68] *et seq.*

⁵ Post, § 222.

⁶ In Georgia both real and personal property may pass by nuncupative will: Code, 1882, § 2482.

⁷ Bright. Purd. Dig. 1883, p. 1709, § 6.

⁸ Blocher v. Hostetter, 2 Gr. Cas. 288, 291. The courts in Pennsylvania hold proponents to a very strict compliance with the literal requirements of the statute in this respect: Ruoff's Appeal, 26 Pa. St. 219; Showers v. Showers, 27 Pa. St. 485, 491; Grabill v. Barr, 5 Pa. St. 441, 445;

Greenough v. Greenough, 11 Pa. St. 489, 496; Snyder v. Bull, 17 Pa. St. 54, 60.

⁹ Alter's Appeal, 67 Pa. St. 341; Nelson v. McDonald, 61 Hun, 406, and cases cited.

¹⁰ Baker v. Denning, 8 Ad. & El. 94, 97, *et seq.*

¹¹ In the Goods of Bryce, 2 Curt. 325, 326, in which the name of the testatrix appeared in no part of the will.

¹² Except in Pennsylvania, for the reason stated *supra*. It is sufficient that the evidence shows the testator's adoption of the mark as his signature, though no witness testifies to having seen him make it: Stephens v. Stephens, 129 Mo. 422.

¹³ Rook v. Wilson, 142 Ind. 24, in which the testator's name was written James Rook, instead of Samuel Rook, as it ought to have been; In the Goods of

Stamp is sufficient. stamp, which had been used by the testator in place of his signature to letters and other documents, was held a sufficient execution by mark.¹ But a seal cannot be used in place of a signature,² * although [* 64] it was at one time so held under the Statute of Frauds. Nor is a seal necessary, although mentioned in the testament clause.³

In the statutes of Arkansas,⁴ California,⁵ Idaho,⁶ Kansas,⁷ Kentucky,⁸ Minnesota,⁹ Montana,¹⁰ New York,¹¹ North Dakota,¹² Ohio,¹³ Oklahoma,¹⁴ Pennsylvania,¹⁵ and South Dakota,¹⁶ it is provided, that the will shall be signed "at the end thereof;" a provision evidently designed to do away with the rule of construction under the Statute of Frauds, that the name of the testator written in the commencement, — thus: "I, A. B., do make" &c., — or in any other part of the will, was a sufficient signature.¹⁷ It is held, under these statutes, that any disposition, following under or after the testator's signature, of the property mentioned in the will, not again signed by the testator, invalidates the whole instrument as a will.¹⁸ But where the portion

Douce, 2 Sw. & Tr. 593, in which the testator's name, *Thomas Douce*, was written throughout *John Douce*; In the Goods of *Clarke*, where the testatrix's maiden name, *Barrell*, had been written instead of the name she bore after her marriage, *Clarke*: 1 Sw. & Tr. 22; In the Goods of *Glover*, where the testatrix wrote the name she bore of a previous husband: 5 Notes of Cas. 553; *Bailey v. Bailey*, 35 Ala. 687, 690. In *Knox's Estate*, 131 Pa. St. 220, under peculiar circumstances, the signature of the first name only was held sufficient; but the mark, whatever it be, must be made with the intent to execute the will by mark: *Plate's Appeal*, 148 Pa. St. 55.

¹ *Jenkins v. Gaisford*, 3 Sw. & Tr. 93, 96.

² *Smith v. Evans*, 1 Wils. 313. In *Nevada* (Gen. St. 1885, § 3002) and *New Hampshire* (Gen. L. 1878, p. 455, § 6) the statute requires the testator to affix his seal to the will, in addition to his signature.

³ *Ketchum v. Stearns*, 8 Mo. App. 66; the unnecessary addition of a seal does not change the essential character of the instrument: *Wnethoff v. Germania Ins. Co.*, 107 N. Y. 580, 592.

⁴ Dig. of St. 1894, § 7392.

⁵ Civ. Code, § 1276.

⁶ Rev. St. 1887, § 5729.

⁷ Gen. St. 1889, § 7206.

⁸ The statute, providing for a will "with the name of the testator subscribed thereto" (Ky. St. 1894, § 4828, unchanged in this respect from previous statutes), is construed as requiring the signature to be written at foot of the will: *Soward v. Soward*, 1 Duv. 126. And see *Flood v. Pragoff*, 79 Ky. 607.

⁹ Gen. St. 1891, § 5629.

¹⁰ Const., Codes and St. 1895, § 1723.

¹¹ 3 Banks & Bro. Rev. St. 7th ed. p. 2285, § 40.

¹² Rev. Code, 1895, § 3648.

¹³ Rev. St. 1890, § 5916.

¹⁴ St. 1890, § 6805.

¹⁵ Bright. Purd. Dig. p. 1709, § 6.

¹⁶ Comp. L. (Terr.) 1887, § 3313.

¹⁷ 1 Jarm. on Wills, *105.

¹⁸ *Wineland's Appeal*, 118 Pa. St. 37; *Glancey v. Glancey*, 17 Oh. St. 134; *Hays v. Harden*, 6 Pa. St. 409 (although the testator only appended a memorandum, stating his reasons for making the will, after his signature), 413; *Re O'Neil*, 27 Hun, 130, 133; s. c. 91 N. Y. 516; if the signature is not at the end, the statute is held not to be complied with, although reference is made in the portion preceding the signature to what follows it, and the words "signature on face of the will"

preceding the signature constitutes a complete will, it may be admitted to probate.¹ Signing below the attestation clause,² or before the date,³ or after a blank space,⁴ does not invalidate the will. In the other States, where the position of the signature is not fixed by statute, the rule adopted in England under the Statute of Frauds is still generally observed: where every part of the will is written by the testator himself, or acknowledged by him to the attesting witnesses, the name appearing in the body, or as the [* 65] *usual exordium, — “I, A. B., do make,” &c., — is a sufficient signing,⁵ if the testator so considered it.⁶ But it has also been held, where the will was not written nor subscribed by the testator, that the name in the exordium does not satisfy the statute requiring the will to be signed.⁷ Where the will is written on separate pieces or sheets of paper, not physically connected, it is sufficient for the probate thereof that it be signed on one of them, if it appear by the contents, or by other proof, that the testator included all of them as constituting the will when he signed.⁸ But words of reference will not suffice to incorporate into it the contents of an extraneous paper, unless it can be

Signature in any part of the will sufficient in the absence of a statute.

Written on separate sheets.

appear at the end, on the ground, mainly, that the statute is to prevent fraud: *Matter of Conway*, 124 New York, 455 (three judges dissenting), to same effect; *Matter of Whitney*, 153 N. Y. 259. But in *Baker's Appeal*, 107 Pa. St. 381, it is held that a will need not be signed at the end in point of space, if so in point of fact.

¹ *Estate of McCullough*, Myr. 76. As where the testator, after his signature, writes a sentence exempting the executor from bond: such addition will be disregarded, and the will probated: *Baker v. Baker*, 51 Oh. St. 217. But “the court would not be justified in fixing upon a signature in the midst of what the testator intended as his will, and treating it as an execution of all that preceded, and granting probate of so much of the will to the disregard of the remainder:” *Margary v. Robinson*, 12 Prob. Div. 8, 13, quoting from *Sweetland v. Sweetland*, 4 Sw. & Tr. 6.

² *Cohen's Will*, Tuck. 286; *Younger v. Duffie*, 94 N. Y. 535.

³ *Flood v. Pragoff*, 79 Ky. 607.

⁴ Nothing intervening between the instrument and signature: *Gilman v. Gilman*, 1 Redf. 354, 365; *In re Collins*, 5 Redf. 20, 25.

⁵ *Armstrong v. Armstrong*, 29 Ala. 538, 540, citing English and American authorities; *Allen v. Everett*, 12 B. Mon. 371, 378; *Adams v. Field*, 21 Vt. 256, 266.

⁶ *Miles's Will*, 4 Dana, 1, 2; *Booth's Will*, 127 N. Y. 109, 115, holding that the writing of the name must be proved to have been for the purpose of validating the instrument; *Roy v. Roy*, 16 Gratt. 418 (held insufficient under the evidence). *Martin v. Hamlin*, 4 Strobb. 188, 190. In Virginia the statute now provides that the will must be so signed as to make it manifest that a signature was intended; and it is held that the name in the exordium is insufficient: *Warwick v. Warwick*, 86 Va. 596.

⁷ *Catlett v. Catlett*, 55 Mo. 330, 339, *et seq.* As to the rule in Louisiana, see *Armant's Succession*, 43 La. An. 310, 314, also commenting on the English rule.

⁸ *Martin v. Hamlin*, 4 Strobb. 188; *Ela v. Edwards*, 16 Gray, 91, 99, citing *Bond v. Seawell*, 3 Burr. 1773, *Gass v. Gass*, 3 Humph. 278, and *Wikoff's Appeal*, 15 Pa. St. 281, 290; *Essex's Case*, cited in 1 Show. 69; *Baker's Appeal*, 107 Pa. St. 381; *Barnewall v. Murrell*, 108 Ala. 366, 378.

clearly shown that, at the time such will was executed, such paper was actually in existence.¹

By the terms of the statutes in all the States, it is believed, except New Jersey and New York, the signature may be written by another person, in the presence and by the express direction of the testator. It is held that the testator's hand may be guided to make the mark, or write his name, and that this constitutes a valid signature by the testator;² and the acknowledgment of the execution of the instrument as a will is a sufficient direction, although signed by another.³ But if the testator direct another person to sign for him, and intends to affix his mark in completion of the signature, the will is not properly signed unless such mark is made;⁴ and where the statute requires the person who writes the testator's name to add his own as a witness, and to state that he wrote the testator's name at his request, as it does in some of the States,⁵ * the [* 66] will is invalid if this is omitted, although the testator affix his mark in person.⁶

In New Jersey and New York it is held that the statute requires the signature to be made by the testator in person, either by writing his name, or making a mark, or acknowledging it to be his signature.⁷

Proof of the testator's signature is *prima facie* proof of his having understandingly executed the same.⁸

§ 40. **Attestation.** — The English Statute of Frauds required the attestation of wills by "three or four credible witnesses," by subscribing the same in the presence of the testator. A similar provision is incorporated into the statutes of all the States, varying, however, as to the num-

¹ Webb v. Day, 2 Dem. 459, 461. See post, § 222, p. * 485.

² Vandruff v. Rinehart, 29 Pa. St. 232, 234; Cozzens's Will, 61 Pa. St. 196, 201; Stevens v. Vancleve, 4 Wash. C. C. 262, 269; Van Hanswyck v. Wiese, 44 Barb. 494, 497; McMechen v. McMechen, 17 W. Va. 683, 711.

³ Herbert v. Berrier, 81 Ind. 1. Mere knowledge by the testator that another is signing, and acquiescing in it, there being no previous express direction, is not enough; and if the previous express direction be given by gestures, they must be as unambiguous as words: Waite v. Frisbe, 45 Minn. 361; Murry v. Hennessey, 48 Neb. 608.

⁴ Main v. Ryder, 84 Pa. St. 217, 223.

⁵ For instance, in Arkansas: Dig. of St. 1894, § 7393; California: Code, §

1278; New York: 2 Banks & Bro. Rev. St. 1896 (9th ed.), p. 1878; Oklahoma: St. 1890, § 6807; Oregon: Code 1887, § 3070.

⁶ Northcutt v. Northcutt, 20 Mo. 266 (this and some other Missouri cases holding the same doctrine were conditioned by a statute now repealed); Will of Cornelius, 14 Ark. 675, 683.

⁷ In re McElwaine, 18 N. J. Eq. 499, 502; Robyns v. Coryell, 27 Barb. 556, 558; Chaffee v. Baptist Missionary Convention, 10 Pai. 85, 91. See remarks of Washington, J., in Stevens v. Vancleve, 4 Wash. 262, 269. Unless the mark be made under decedent's direction and afterwards acknowledged as his signature: Knapp v. Reilly, 3 Dem. 427, 431, and New York cases cited.

⁸ Sheer v. Sheer, 159 Ill. 591, 594.

ber of witnesses required, and as to the further requirement that the witnesses shall subscribe "in the presence of each other." Wills devising real estate are required to be attested by "two or more," or "at least two" witnesses, in Alabama,¹ Arizona,² Arkansas,³ California,⁴ Colorado,⁵ Delaware,⁶ Florida,⁷ Idaho,⁸ Illinois,⁹ Indiana,¹⁰ Iowa,¹¹ Kansas,¹² Kentucky,¹³ Maryland,¹⁴ Michigan,¹⁵ Minnesota,¹⁶ Mississippi,¹⁷ Missouri,¹⁸ Nebraska,¹⁹ Nevada,²⁰ New Jersey,²¹ New York,²² North Carolina,²³ North Dakota,²⁴ Ohio,²⁵ Oklahoma,²⁶ Oregon,²⁷ Pennsylvania,²⁸ Rhode Island,²⁹ South Dakota,³⁰ Tennessee,³¹ Texas,³² [* 67] Utah,³³ Virginia,³⁴ Washington,³⁵ West Virginia,³⁶ * Wisconsin,³⁷ and Wyoming;³⁸ and by three or more in Connecticut,³⁹ Georgia,⁴⁰ Maine,⁴¹ Massachusetts,⁴² New Hampshire,⁴³ South Carolina,⁴⁴ and Vermont.⁴⁵ In Louisiana the forms of the civil law are followed to some extent, and three resident or five non-resident witnesses are required for nuncupative or "open" testaments, while a "mystic," "secret," or "closed" testament must be delivered to a notary public in a sealed envelope, and attested by seven witnesses, who, together with the notary and the testator, are required to sign the "act of superscription" drawn up by the notary, after the declaration by the testator, in the presence of the notary and witnesses, that the enclosed paper contains his testament.⁴⁶

¹ Code, 1896, § 4263.

² Rev. St. 1887, § 3234.

³ Dig. of St. 1894, § 7392.

⁴ Civ. Code, § 1276, pl. 4.

⁵ Mills' Ann. St. 1891, § 4653.

⁶ Rev. Code, 1874, p. 509, § 3.

⁷ Rev. St. Fla. 1892, § 1795.

⁸ Rev. St. 1887, § 5727, pl. 4.

⁹ St. & Curt. Ann. St. 1896, p. 4026, § 2.

¹⁰ Burns' Ann. St. 1894, § 2746.

¹¹ Code, 1897, § 3274.

¹² Gen. St. 1897, ch. 110, § 2.

¹³ St. 1894, § 4828.

¹⁴ Code, 1888, Art. 93, § 310. Before this revision the requirement was, like that of the English Statute of Frauds, "three or four."

¹⁵ How. St. 1882, § 5789.

¹⁶ Gen. St. 1891, § 5629.

¹⁷ Ann. Code, 1892, § 4488.

¹⁸ Rev. St. 1889, § 8870.

¹⁹ Cons. St. 1893, § 1186.

²⁰ Rev. St. 1885, § 3002.

²¹ Gen. St. 1896, p. 3760, § 22.

²² Banks & Bro. Rev. St. (9th ed.) 1896, p. 1887, § 40, pl. 4.

²³ Code, 1883, § 2136.

²⁴ Rev. Code, 1895, § 3648, pl. 4.

²⁵ Rev. St. 1890, § 5916.

²⁶ St. 1891, § 6805, pl. 4.

²⁷ Code, 1887, § 3069.

²⁸ Pepper & Lewis' Dig. 1896, p. 1439, § 32. But the witnesses in this State are not required to subscribe the will: *Frew v. Clarke*, 80 Pa. St. 170, 178, and numerous Pennsylvania cases there cited.

²⁹ Gen. L. 1896, p. 665, § 13.

³⁰ Terr. Code, 1884, § 691 of Civ. Code, pl. 4.

³¹ Code, 1884, § 3003.

³² Rev. St. 1895, § 5335.

³³ Rev. St. 1898, § 2735.

³⁴ Code, 1887, § 2514.

³⁵ Gen. St. and C. 1891, § 1459.

³⁶ Code, 1891, ch. 77, § 3.

³⁷ Ann. St. 1889, § 2282.

³⁸ Rev. St. 1887, § 2237.

³⁹ Gen. St. 1888, § 538.

⁴⁰ Code, 1895, § 3272.

⁴¹ Rev. St. 1883, p. 608, § 1.

⁴² Pub. St. 1882, p. 747, § 1.

⁴³ Pub. St. 1891, ch. 186, § 2.

⁴⁴ Rev. St. 1893, § 1988.

⁴⁵ St. 1894, § 2349.

⁴⁶ Voorhies' Rev. C., 1889, art. 1574 et seq.

With the exception of Arkansas,¹ and New York,² whose statutes are held not to require attestation by signing in the presence of the testator, and of Pennsylvania,³ where it is held that the witnesses are not required to subscribe their names at all, and with the exception of holographic wills, authorized in some of the States without attestation,⁴ the attesting witnesses are required to subscribe the will *in the presence of the testator*. It seems to be unnecessary to cite any of the numerous cases so holding.⁵ To constitute "presence" in the sense of the English Statute of Frauds and of the American statutes on the subject of wills, it is essential that the testator should be mentally capable of recognizing the act which is being performed before him; for if this power be wanting, his corporeal presence would not suffice.⁶ It is not essential that the * testator [* 68] should actually see the witness attest the will; but he must be in such a situation that he might see, and it will then be presumed that he did see.⁷ The design of the statute is said to be to prevent the substituting of a surreptitious will.⁸

In Louisiana,⁹ South Carolina,¹⁰ and Vermont,¹¹ the statute requires the attesting witnesses to subscribe, not only in the presence of the testator, but also of each other; and in New Jersey the statute requiring publication in the presence of two witnesses "present at the same time, who shall

But, in most States, not necessarily in the presence of each other.

¹ Rogers v. Diamond, 13 Ark. 474, 486; Abraham v. Wilkins, 17 Ark. 292, 325.

² Lyon v. Smith, 11 Barb. 124, 126; Rudden v. McDonald, 1 Bradf. 352.

³ Frew v. Clarke, 80 Pa. St. 170.

⁴ As to which see *post*, § 43.

⁵ It is not enough that the witness subsequently acknowledges his signature in the testator's presence, if affixed in his absence; Pawtucket v. Ballou, 15 R. I. 58; Chase v. Kittredge, 11 Allen, 49. But see Cook v. Winchester, 81 Mich. 581, and authorities cited *pro* and *con* on the effect of the witnesses' subsequent acknowledgment.

⁶ "Thus, if the testator, after having signed and published his will, and before the witnesses have subscribed their names, falls into a state of insensibility (whether permanent or temporary), the attestation is insufficient": 1 Jarm. on Wills, * 87, citing Right v. Price, 1 Dougl. 241, and other English authorities. "It would seem that a lunatic or person sleeping could not be considered present": Lacy, J., in Baldwin v. Baldwin, 81 Va. 405, 410.

⁷ Walker v. Walker, 67 Miss. 529; Witt v. Gardner, 158 Ill. 176; Edelen v.

Hardy, 7 Harr. & J. 61, 67; Graham v. Graham, 10 Ired. L. 219, 221; Wright v. Lewis, 5 Rich. 212, 217; Lamb v. Girtman, 33 Ga. 289, 291, 293; Spaulding v. Gibbons, 5 Redf. 316, 319; Allen's Will, 25 Minn. 39; Riggs v. Riggs, 135 Mass. 238; Etchison v. Etchison, 53 Md. 348, 357; Maynard v. Vinton, 59 Mich. 139; Baldwin v. Baldwin, 81 Va. 405; Ayers v. Ayers, 43 N. J. Eq. 565. "An attestation made in the same room with the testator is *prima facie* good; and where the attestation is shown to have taken place in a different apartment, it is *prima facie* bad:" Watson v. Pipes, 32 Miss. 451, 467.

⁸ Hill v. Barge, 12 Ala. 687, 696; Cravens v. Faulconer, 28 Mo. 19, 21; Ambre v. Weishaar, 74 Ill. 109, 113; Nock v. Nock, 10 Gratt. 106, 112; Swift v. Wiley, 1 B. Mon. 114, 117, distinguishing between the "attesting" and the "subscribing" of a will; Reynolds v. Reynolds, 1 Speers, 253, 255; Ayers v. Ayers, 43 N. J. Eq. 565.

⁹ Voorhies' C. 1889, art. 1581.

¹⁰ Rev. St. 1893, § 1988.

¹¹ Rev. St. 1894, § 2349.

subscribe their names thereto as witnesses in presence of the testator," is held to require that all shall be together when the declaration is made.¹ The same construction has been given to the word "presence" in respect of the witnesses between themselves, as to that of the testator;² and in the absence of a statutory provision to that effect it is not necessary that they should sign in each other's presence.³ In the absence of clear proof that the witness or witnesses signed before the signing of the testator, it should be presumed that the testator signed first.⁴ But it is held that it is essential to the due execution of the will that the signature of the testator should precede, in point of time, the signatures of the attesting witnesses, even if the signing and attestation be on the same occasion and part of the same transaction,⁵ though on the latter point the authorities are not unanimous.⁶

It is required by statute in some of the States that the sub-
[* 69] scription * of the attesting witnesses, like that of the testator, be at the end of the instrument. Where such is the law, the will becomes void if the testator, after proper signature and attestation, adds a disposing clause, which is again signed by him, but not attested.⁷ In the absence of statutory direction, it is not material in what part of a will the subscribing witnesses sign their names, if it is done after the subscription and acknowledgment by the testator, and with the purpose of attesting it as subscribing witnesses.⁸

Attestation good in any part of the will, unless statute requires it to be at the end.

Under the English Statute of Frauds it was held sufficient that the witnesses subscribed their names as such, at the testator's request,

¹ *Ludlow v. Ludlow*, 36 N. J. Eq. 597, 599; *Ayers v. Ayers*, 43 N. J. Eq. 565, 569.

² "It is sufficient if the testator and witnesses are all in the same room when the signatures of all the witnesses are made, and are there for the purpose of taking part in the execution of the will, and have an opportunity to see all the witnesses sign the will, if they choose to turn their eyes in that direction": syllabus in *Blanchard v. Blanchard*, 32 Vt. 62.

³ *Cravens v. Faulconer*, 28 Mo. 19, 21; *Parramore v. Taylor*, 11 Gratt. 220, 249; *Abraham v. Wilkins*, 17 Ark. 292, 324, *et seq.*; *Gaylor's Appeal*, 43 Conn. 82, 84, *et seq.*; *Hoysrodt v. Kingman*, 22 N. Y. 372, 373; *Dewey v. Dewey*, 1 Metc. (Mass.) 349, 351; *Flinn v. Owen*, 58 Ill. 111, 114; *Hoffman v. Hoffman*, 26 Ala. 535, 546; *Moore v. Spier*, 80 Ala. 129, 133; *Smith's Will*, 52 Wis. 543, 547;

Welch v. Adams, 63 N. H. 344; *Johnson v. Johnson*, 106 Ind. 475.

⁴ *Allen v. Griffin*, 69 Wis. 529, 533.

⁵ *Jackson v. Jackson*, 39 N. Y. 153; 161; *Brooks v. Woodson*, 87 Ga. 379; *Ragland v. Huntington*, 1 Ired. L. 561; see also English cases cited by Gray, J., in *Chase v. Kittridge*, 11 Allen, 49, on p. 56.

⁶ The order of signing was held immaterial in such case, in *O'Brien v. Gallagher*, 25 Conn. 229; *Swift v. Wiley*, 1 B. Mon. 114, 117; *Miller v. McNeill*, 35 Pa. St. 217; *Rosser v. Franklin*, 6 Gratt. 1, 26; *Kaufman v. Caughman*, 49 So. Car. 159, 167.

⁷ *Hewitt v. Hewitt*, 5 Redf. 271, 274, affirmed in *Hewitt's Will*, 91 N. Y. 261; *Re Case*, 4 Dem. 124.

⁸ *Fowler v. Stagner*, 55 Tex. 393, 400; *Roberts v. Phillips*, 4 El. & Bl. 450, 453; *Peake v. Jenkins*, 80 Va. 293, 296; *Franks v. Chapman*, 64 Tex. 159.

Testator must sign or acknowledge signature in presence of witnesses.

without seeing his signature or being informed of the nature of the instrument.¹ But by the Wills Act, and under American statutes generally, it is required that the testator shall sign, or acknowledge his signature, in presence of the attesting witnesses;² and it is held in

England that where the attesting witnesses are unable to see the signature, and the testator gives no explanation of the instrument, the signature is not properly acknowledged.³

In most of the States they must know, also, that he signed the instrument as and for his last will; to which end it is enacted by statute in Arkansas,⁴ California,⁵ Georgia,⁶ New Jersey,⁷ and New York,⁸ that, in addition to the acknowledgment of his signature, the testator must publish or declare in the presence of the attesting witnesses that the instrument by him executed is intended as his will.⁹ In * these and other States it is held [* 70]

And declare testamentary character of instrument.

Attesting witnesses sign *animo attestandi*.

¹ Wms. Ex. [87], with English authorities.

² The attesting witnesses need not see the physical act of signing; it is enough, generally, that the testator acknowledges that the instrument with his name attached is his will, although the witnesses neither saw him subscribe his name in person, nor another sign his name at his request and in his presence: *Walton v. Kendrick*, 122 Mo. 504, 525, and authorities referred to in the opinion (which disapproves *Burwell v. Corbin*, 1 Rand. 131); *Hobart v. Hobart*, 154 Ill. 610, holding that the testator need not specially acknowledge the signature, if he acknowledges the will to be his, and distinguishing the statute from that of New York and some other States, where such is required, and which are referred to below. So also the silence and presence of the testator gives consent to the declarations on the part of the person superintending the execution of the will, and amounts to an acknowledgment: *Harp v. Parr*, 168 Ill. 459, and cases cited on p. 475 of the opinion.

³ *Goods of Hammond*, 3 Sw. & Tr. 90, 92. See *Lewis v. Lewis*, 13 Barb. 17, and English cases there cited and commented on. In America, by the terms of the statutes in many States, it is necessary that the attesting witnesses should either see the testator sign the instrument, or that he should acknowledge his signature to them.

⁴ Dig. of St. 1894, § 7392.

⁵ Civ. Code, § 1276.

⁶ But acknowledgment of the signature is a sufficient publication: *Webb v. Fleming*, 30 Ga. 808.

⁷ Gen. St. 1896, p. 3760, § 22.

⁸ 2 Banks & Bro. Rev. St. (9th ed.) p. 1877, § 40, pl. 3.

⁹ It is held under these statutes that such publication may be made spontaneously, or by answering questions put by the scrivener or others, or in any way, by signs or gestures, or circumstances, communicating to the witnesses that he so understands it: *Rogers v. Diamond*, 13 Ark. 474; *Denny v. Pinney*, 60 Vt. 524; *Brinckerhoof v. Remsen*, 8 Pai. 488, 497, *et seq.*; *Lewis v. Lewis*, 13 Barb. 17, 24; *Tunison v. Tunison*, 4 Bradf. 138, 144; *McKinley v. Lamb*, 64 Barb. 199, 203, *et seq.*; *In re Hunt*, 110 N. Y. 278; *Compton v. Mitton*, 12 N. J. L. 70, 73, *et seq.*; *Ludlow v. Ludlow*, 36 N. J. Eq. 597; especially when written by the testatrix: *Re Beckett*, 103 N. Y. 167; and it may be made on different occasions, and when the witnesses are apart from each other: *Barry v. Brown*, 2 Dem. 309; but the testamentary character of the paper must not be inferred from previous conversation; the declaration must be made *at the time* of making or acknowledging the signature: *Walsh v. Laffan*, 2 Dem. 498, citing numerous New York cases; unless such previous conversation be so referred to by the testator, at the time of the exe-

that the attesting witnesses must subscribe their names *animo attestandi*,¹ but that no affirmative declaration to that end is necessary; any indication by the testator to the witnesses of his knowledge that the instrument to be attested by them is meant for his last will, is sufficient.² In Georgia,³ Illinois,⁴ Indiana,⁵ Iowa,⁶ Massachusetts,⁷ South Carolina,⁸ and Virginia,⁹ it is held that publication to the witnesses is not necessary to the validity of the will. The rule in England, both before¹⁰ and after¹¹ the statute of 1 Vict. c. 26, is clearly established, that the witnesses need not know the character of the paper attested by them; the theory being that the attestation was to the *signature*, not to the *document* proposed as a will. The same doctrine is held in Alabama,¹² Connecticut,¹³ Georgia,¹⁴ Indiana,¹⁵ Iowa,¹⁶ Maine,¹⁷ Maryland,¹⁸ Minnesota,¹⁹ Pennsylvania,²⁰ South Carolina,²¹ Virginia,²² and Wisconsin.²³

[* 71] * It is not necessary to use any particular form in the

cution, as to make it an essential part of the communication: *In re Beckett*, 103 N. Y. 167, 176; *Robbins v. Robbins*, 50 N. J. Eq. 742. In *Matter of Mackey*, 44 Hun. 571, it is said that it is impossible under the statute to acknowledge the testator's signature, unless the witness see the signature sought to be acknowledged; s. c. 110 N. Y. 611, followed in *Matter of Landy*, 148 N. Y. 403, the court holding that the attesting witnesses must either see the testator subscribe his name, or with the signature visible to them, acknowledge it to be his.

¹ As in Louisiana: *Buntin v. Johnson*, 28 La. An. 796; Vermont: *Roberts v. Welch*, 46 Vt. 164, 168; Virginia: *Peake v. Jenkins*, 80 Va. 293.

² So held in Arkansas: *Rogers v. Diamond*, 13 Ark. 474; Delaware: *Smith v. Dolby*, 4 Harr. 350, 351; Kentucky: *Ray v. Walton*, 2 A. K. Marsh. 71, 74; *Upchurch v. Upchurch*, 16 B. Mon. 102, 112, citing earlier Kentucky cases; Maine: *Cilley v. Cilley*, 34 Me. 162, 164; Missouri: *Odenwaelder v. Schorr*, 8 Mo. App. 458; *Grimm v. Tittman*, 113 Mo. 56, 65; New Jersey: *Ayers v. Ayers*, 43 N. J. Eq. 565, 571; but what is said must lead to the single inference that the document is testator's will; *Darnell v. Busby*, 50 N. J. Eq. 725; New York: *Matter of Hunt*, 110 N. Y. 278, 281; *Lane v. Lane*, 95 N. Y. 494; *Matter of Austin*, 45 Hun. 1; Ohio: *Randebaugh v. Shelley*, 6 Oh. St. 307, 315; Vermont: *Dean v. Dean*, 27 Vt. 746, 751. It is sufficient if the draughts-

man in presence of the testatrix announces to the attesting witnesses that the instrument is her will: *Denny v. Pinney*, 60 Vt. 524; Oregon: but mere silence is insufficient: *Luper v. Werts*, 19 Ore. 122.

³ *Webb v. Fleming*, 30 Ga. 808, 812.

⁴ *Dickie v. Carter*, 42 Ill. 376, 386, *et seq.*

⁵ *Brown v. McAlister*, 34 Ind. 375; *Turner v. Cook*, 36 Ind. 129, 136.

⁶ *Hulse's Will*, 52 Iowa, 662.

⁷ *Osburn v. Cook*, 11 Cush. 532.

⁸ *Verdier v. Verdier*, 8 Rich. 135, 142.

⁹ *Beane v. Yerby*, 12 Gratt. 239, 244.

¹⁰ *Wyndham v. Chetwynd*, 1 Burr.

414, 421; *Wright v. Wright*, 7 Bing. 457.

¹¹ *Keigwin v. Keigwin*, 3 Curt. 607;

Faulds v. Jackson, 6 Notes Cas. Sup. 1.

¹² *Barnewall v. Murrell*, 108 Ala. 366, 382.

¹³ *Canada's Appeal*, 47 Conn. 450.

¹⁴ *Webb v. Fleming*, 30 Ga. 808.

¹⁵ *Brown v. McAlister*, 34 Ind. 375.

¹⁶ *Hulse's Will*, 52 Iowa, 662, criticizing *Lorieux v. Keller*, 5 Iowa, 196.

¹⁷ *Cilley v. Cilley*, 34 Me. 162.

¹⁸ *Higgins v. Carlton*, 28 Md. 115; *Etchison v. Etchison*, 53 Md. 348. And so in the District of Columbia: *In re Porter*, 20 Dist. Col. 493.

¹⁹ *Allen's Will*, 25 Minn. 39.

²⁰ *Loy v. Kennedy*, 1 W. & S. 396; *Miller v. McNeill*, 35 Pa. St. 217.

²¹ *Verdier v. Verdier*, 8 Rich. L. 135.

²² *Beane v. Yerby*, 12 Gratt. 239; *Young v. Barnett*, 27 Gratt. 96.

²³ *Allen v. Griffin*, 69 Wis. 529, 535.

No form of attestation necessary. attestation;¹ the omission altogether of an attestation clause is not fatal to the will,² and its recitals may be contradicted by parol evidence, if erroneous.³ The witnesses, like the testator, may subscribe by mark,⁴ or by their initials,⁵ if intended for their mark; or if they cannot write, the hand may be guided by another person.⁶ But prudence requires that the attesting witnesses should be selected among persons who can read and write, and that the attestation clause should recite all the formalities required in the execution and attestation of a will, because, in the absence of proof on these points, compliance with them may be inferred from their recital in the attestation clause;⁷ and such

Attestation may be by mark, or initials.

¹ *Leaycraft v. Simmons*, 3 Bradf. 35, 37; *Fatheree v. Lawrence*, 33 Miss. 585, 623; *Ela v. Edwards*, 16 Gray, 91, 96; *Chaffee v. Baptist Convention*, 10 Pai. 85; *Crittenden's Estate*, Myr. 50; *Robinson v. Brewster*, 140 Ill. 649; *Olerick v. Ross*, 146 Ind. 282.

² *Berberet v. Berberet*, 131 Mo. 399; *Fry's Will*, 2 R. I. 88, 91; *Taylor v. Brodhead*, 5 Redf. 624, 626, citing *Baskin v. Baskin*, 48 Barb. 200; *Re Philips Will*, 1 How. Pr. (N. Y.) 291; s. c. 98 N. Y. 267.

³ *Chaffee v. Baptist Convention*, 10 Pai. 85, 89; *Taylor v. Brodhead*, *supra*. One who signs his name in the place where subscribing witnesses usually sign may show that he, in fact, did not sign as a subscribing witness: *Boone v. Lewis*, 103 N. C. 40.

⁴ *Thompson v. Davitte*, 59 Ga. 472, 481; *Compton v. Mitton*, 12 N. J. L. 70, 73; *Jesse v. Parker*, 6 Gratt. 57, 63; *Meehan v. Rourke*, 2 Bradf. 385, 392; *Pridgen v. Pridgen*, 13 Ired. L. 259; *Ford v. Ford*, 7 Humph. 92, 96; *Montgomery v. Perkins*, 2 Metc. (Ky.) 448; *Derry's Estate*, Myr. 202; *Davis v. Semmes*, 51 Ark. 48. It has even been held in some cases that one witness may also sign the name of another at the latter's request, when prevented by physical disability from signing himself: *Matter of Strong*, 2 Connoly. 574, and cases cited; and in South Carolina the attestation is valid though the non-signing witness could have signed, but does not, and does not touch the pen, if his name is signed by another witness in the presence of the testator: *Smythe v. Irick*, 46 S. C. 299; but though one be competent as a sub-

scribing witness, he cannot perform the act of subscription wholly through another person who is legally incompetent himself: *Simmons v. Leonard*, 91 Tenn. 183, 188 (the witness in this case did not even make his mark); in any event the witness must touch the pen making the mark in Tennessee: *McFarland v. Bush*, 94 Tenn. 538. The Georgia Code provides that a witness may subscribe by mark, "provided he can swear to the same;" it was held that this statute only means that he must be *competent* at the time of attesting, and it is not essential that he be able to identify the mark when the will is offered for probate, if the facts can be proved by other non-attesting witnesses: *Gillis v. Gillis*, 96 Ga. 1.

⁵ *Adams v. Chaplin*, 1 Hill (S. C.) Eq. 265, 266. But in California it was held (three judges giving dissenting opinions) that the statute of that State differs from the English statute in requiring the witness to sign *his name* as a witness at the *end of the will*; and that hence where the witness inadvertently signed a different name instead of his own, although intending it to be his, the will was not legally executed: *In re Walker*, 110 Cal. 387.

⁶ *Campbell v. Logan*, 2 Bradf. 90, 97.

⁷ *Nelson v. McGiffert*, 3 Barb. Ch. 158, 162; *Hall v. Hall*, 18 Ga. 40, 46; *Allaire v. Allaire*, 37 N. J. L. 312, 325, affirmed in 39 N. J. L. 113; *Lewis v. Lewis*, 13 Barb. 17, 25; *Rugg v. Rugg*, 83 N. Y. 592; *Meurer's Will*, 44 Wisc. 392, 399; 1 Am. Pr. R. 518, citing numerous New York cases; in New Jersey it was held that the statement of facts in the attestation clause throws the burden of disproving them upon

recital may also furnish protection against the lack of memory or wilful fraud of attesting witnesses.¹

The date is not an absolutely essential part of a will;² it may be held valid, though it has no date, or a wrong one. If the actual date of its execution becomes material, it may be established by parol proof.³ Where the will is dated, the presumption is that it was made at the time of its date.⁴ Nor is it essential that the will should show the place where it [*72] was made; this is a matter *dehors* the will, which may be proved like any other fact.⁵ But the importance of showing in the will itself both its date and place of making is obvious: its validity may depend upon either of these facts, and if no proof can be made of them it may lead to its rejection.⁶

It may be stated, in this connection, that where there is a change in the law governing the execution of a will, made in the interim between its execution and the testator's death, the question arises as to which law governs. It is held in some States that the law in force when the will is executed must be complied with;⁷ while the stronger reasoning seems to lead to the conclusion that the will should be executed in conformity to the law in force at the testator's death.⁸

§ 41. **Competency of Attesting Witnesses.**—The statutes mostly require the witnesses to be "credible" or "competent;" by which is meant that they must be competent persons to testify in a court of

the opponents of the will: *Tappen v. Davidson*, 27 N. J. Eq. 459. See *post*, § 218, and cases cited on page *475.

¹ *McMeekin v. McMeekin*, 2 Bush, 79 (in this case all the attesting witnesses testified that the testator had not a disposing mind); *Brown v. Clark*, 77 N. Y. 369; and see cases *post*, § 218, p. *475, on the subject of probate of wills.

² *Flood v. Pragoff*, 79 Ky. 607; *Austin v. Fielder*, 40 Ark. 144.

³ *Wright v. Wright*, 5 Ind. 389, 392; *Deakins v. Hollis*, 7 Gill & J. 311, 316. But a holographic will must, according to the statute of California, be dated by the testator: *Estate of Martin*, 58 Cal. 530, 532.

⁴ *Sawyer v. Sawyer*, 7 Jones L. 134.

⁵ *Succession of Hall*, 28 La. An. 57.

⁶ *Phipps v. Earl of Anglesey*, 7 Br. P. C. 443, holding that two inconsistent wills of the same date, neither of which can be proved to have been last executed, must both be rejected on the ground of uncertainty.

⁷ Because the statute should not oper-

ate retrospectively: *Taylor v. Mitchell*, 57 Pa. St. 209; *Lane's Appeal*, 57 Conn. 182 (the latter case relying partly upon a Vermont case, not in point, because the change in the law was made *after* the testator's death; and English cases, one of which is a mere dictum, and the other discusses the rule governing the *construction of devises*, which is considered *post*, §§ 419, 420); "The legality of the execution of a will is to be judged of by the law as it stood at the time of its execution:" *per* Clarke, J., in *Quin's Estate*, 144 Pa. St. 444, on p. 459; *Packer v. Packer*, 179 Pa. St. 580. It is held also that a will executed by one having no statutory power or capacity to make a will (as, for instance, married women), is not rendered valid by a subsequent statute enacted before his or her death conferring such right: *Mitchell v. Kimbrough*, 98 Tenn. 535, 538.

⁸ *Sutton v. Chenault*, 18 Ga. 1; *Elcock's Will*, 4 McCord, 39 (will of personalty); *Lawrence v. Hibbard*, 1 Bradf. 252; *Langly v. Langly*, 18 R. I. 618.

justice, not being disqualified by mental imbecility, interest, crime, or marital relation.¹ That the competency of the witnesses as attesting witnesses must refer to the time of attestation seems clear enough on principle; else the validity of the will would be made dependent on circumstances beyond the control of the testator, and enable the attesting witnesses, by rendering themselves incompetent, to defeat it.² It is so enacted in most of the States;³ and where not enacted by statute, it is nevertheless generally so held by the courts.⁴

It was held under the English Statute of Frauds, that a beneficial interest under the will disqualified the legatee as an attesting witness,⁵ which led to the enactment of a statute to remedy a law which "alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom that depended upon devises by will," because it "would not allow any legatee, nor by consequence a creditor,* where the legacies were charged upon real estate, [*73] to be a competent witness to the devise."⁶ This statute⁷ provided that any attesting witness to whom a beneficial devise, gift, or interest (except charges on lands for payment of debts) was thereby made or given, should be admitted as a witness to the will; and "such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerned such person attesting the execution of such will, or any person claiming under him, be utterly null and void;" and that charges of debts upon lands should not render the creditor an incompetent witness. The provisions of this statute are substantially enacted in most of the States;⁸ hence, in

Competency refers to time of attestation.

Persons made beneficial legatees incompetent as attesting witnesses.

Attesting witnesses competent by statute; but legacy to them made void.

¹ *Carlton v. Carlton*, 40 N. H. 14, 17; *Sullivan v. Sullivan*, 106 Mass. 474; *Comb's Appeal*, 105 Pa. St. 155; *Fuller v. Fuller*, 83 Ky. 345; *Noble's Will*, 124 Ill. 266. A wife is not a competent witness to her husband's will: *Pease v. Allis*, 110 Mass. 157; nor a husband to his wife's will: *Dickenson v. Dickenson*, 61 Pa. St. 401; *Smith v. Jones*, 68 Vt. 132.

² *Workman v. Dominick*, 3 Strobb. 589; *Patten v. Tallman*, 27 Me. 17, 27; *Haven v. Hilliard*, 23 Pick. 10, 18; *Morton v. Ingram*, 11 Ired. L. 368; *Higgins v. Carlton*, 28 Md. 115, 140; *Smith v. Jones*, *supra*.

³ For instance, in Alabama, California, Indiana, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Vermont, and Wisconsin. In Georgia the competency mentioned relates to the time of testifying; but it is also provided that

subsequent disability of attesting witnesses constitutes no bar to the probate of the will. In Louisiana women are declared incompetent as attesting witnesses, but may prove the handwriting of a testator when necessary to prove a testament: *Succession of Roth*, 31 La. An. 315, 321.

⁴ *Noble v. Burnett*, 10 Rich. 505, 518, *et seq.*; *Stewart v. Harriman*, 56 N. H. 25, 27; *Rucker v. Lambdin*, 12 Sm. & M. 230, 250; *Frink v. Pond*, 46 N. H. 125, 126; *Hopf v. State*, 72 Tex. 281, 287; *Fisher v. Spence*, 150 Ill. 253.

⁵ *Holdfast v. Downing*, 2 Stra. 1253; *Trotter v. Winchester*, 1 Mo. 413.

⁶ 2 Bla. Comm. 377.

⁷ 25 Geo. II. c. 6.

⁸ In Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts,

them, interest in the probate of a will does not disqualify an attesting witness, but the fact of attesting disqualifies the witness from being a beneficiary legatee or devisee; it destroys his interest in the will.¹ That such is the intention with which these statutes were enacted, is evidenced in many of them by affirmatively providing that such witnesses may be compelled to testify.²

It is also provided by the statutes of most of the States, that where an attesting witness is also heir at law of the testator, as well as legatee, so that he would be entitled to a distributive share of the estate in case the will were not established, he is not only a competent witness, but may take under the will so much that would come to him by descent or distribution as may not exceed the amount of the devise or legacy to him.³ The same view is taken by [* 74] * courts in the absence of a statutory provision,⁴ and, *a fortiori*, a legatee is a competent witness *against* a will.⁵

Where a will contains a devise or legacy to an attesting witness, but is attested by a sufficient number of competent witnesses in addition to such devisee or legatee, it may be proved without his testimony, and the will held good, including the gift to the attesting witness.⁶ It is so enacted

Except as to heirs, who would take without the will.

But legatee attesting may take under will, if

Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New York, North Carolina, Oregon, Rhode Island, South Carolina, Texas, Vermont, Virginia, West Virginia, and Wisconsin. The English statute is held to be in force in the District of Columbia: *Elliott v. Brent*, 6 Mackey, 98. In Alabama the statute avoiding a legacy to an attesting witness was repealed in 1867; and it is there held that the common-law rule as to the competency of legatees and devisees as attesting witnesses was not revived by such repeal, but that they were thereby made competent witnesses, in accordance with the general object of the law changing the competency of all witnesses as affected by interest. Hence, in Alabama, legatees and devisees are competent attesting witnesses: *Kumpe v. Coons*, 63 Ala. 448, 453.

¹ *Fowler v. Stagner*, 55 Tex. 393, 398; *Giddings v. Turgeon*, 58 Vt. 106, 111; *Grimm v. Tittman*, 113 Mo. 56; *Harp v. Parr*, 168 Ill. 459, 473.

² So in the statutes of Arkansas, Colorado, Illinois, Indiana, Kentucky, New York, North Carolina, Rhode Island, Texas, Vermont, Virginia, and West Virginia.

³ So in Arkansas, California, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New York, Oregon, South Carolina, Texas, Virginia, West Virginia, and Wisconsin. In Connecticut the devise to an attesting heir at law is good: *Gen. St. 1888*, p. 134, § 539. So held in *Fortune v. Buck*, 23 Conn. 1, 6; two judges dissenting, holding that the statute held devise good only to the extent of the inheritance (p. 9). In Vermont the heir at law is excepted from the provision affecting devisees to attesting witnesses: *St. 1894*, § 2353. In Tennessee the statute provides that the will shall be attested by two witnesses at least, no one of which shall be interested in the devised lands; and it is held that a legatee of personalty, who is also an heir at law, but takes no interest in the land under the will, is a competent witness: *Walker v. Skeene*, 3 Head, 1, 4.

⁴ *Graham v. O'Fallon*, 4 Mo. 601; *Dickey v. Malechi*, 6 Mo. 177; *Comstock v. Hadlyme Society*, 8 Conn. 254.

⁵ *Leslie v. Sims*, 39 Ala. 161.

⁶ Where, as in New York, the will may be proved by the remaining witnesses if one of them be a non-resident, the testi-

lawfully
proved with-
out his sig-
nature.

by statute in Arkansas,¹ California,² Colorado,³ Connecticut,⁴ Illinois,⁵ Indiana,⁶ Iowa,⁷ Kansas,⁸ Kentucky,⁹ Massachusetts,¹⁰ Michigan,¹¹ Minnesota,¹² Missouri,¹³ Nebraska,¹⁴ Nevada,¹⁵ New Hampshire,¹⁶ New York,¹⁷ North Dakota,¹⁸ Ohio,¹⁹ Oregon,²⁰ Texas,²¹ Utah,²² Vermont,²³ West Virginia,²⁴ and Wisconsin.²⁵ In Maine²⁶ the statute provides for attestation by three credible witnesses not beneficially interested; and in Texas,²⁷ if one of the attesting witnesses be a devisee or legatee, the will may be proved by the corroboration of one or more other "disinterested and credible" witnesses, and will then be good, including the gift to the attesting witness.

It was a question under the Statute of Frauds whether a witness rendered incompetent by reason of his interest under the will could

Witness
incompetent
becomes
competent
by releasing
his interest.

be restored to competency by destroying his interest by means of a release or payment before * tes- [* 75] tifying; and it seems that the law was finally so held.²⁸ But such a witness is not rendered competent by an assignment of his interest; it must be by release.²⁹

This subject is regulated by statute in Arkansas,³⁰ Missouri,³¹ Oregon,³² and Rhode Island.³³ In Illinois,³⁴ Ohio,³⁵ and North Carolina³⁶ it has been held that a release will not render competent an attesting witness.

The interest disqualifying a devisee or legatee is a beneficial

mony of such non-resident is held unnecessary, and hence a legacy to him is not thereby avoided: *Cornwell v. Woolley*, 47 Barb. 327.

¹ Dig. of St. 1894, § 7435.

² Civ. Code, § 1282.

³ 2 Mills' Ann. St. 1891.

⁴ Gen. St. 1887, § 539.

⁵ St. & Curt. Ann. St. 1896, p. 4039,

§ 8.

⁶ Burns' Ann. St. 1894, § 2756.

⁷ Code, 1897, § 3275.

⁸ Gen. St. 1897, ch. 110, § 11.

⁹ St. 1894, § 4836.

¹⁰ Pub. St. 1882, p. 748, § 3.

¹¹ How. St. 1882, § 5791.

¹² Gen. St. 1891, § 5637.

¹³ Rev. St. 1889, § 8905.

¹⁴ Cons. St. 1893, § 1189.

¹⁵ Gen. St. 1885, § 3003.

¹⁶ Pub. St. 1891, ch. 186, § 3.

¹⁷ Banks & Bro. Rev. St. (9th ed.) p. 1879, § 50.

¹⁸ Rev. Code, 1895, § 3679.

¹⁹ Bates' Ann. St. 1897, § 5925.

²⁰ Code, 1887, § 3087.

²¹ Rev. St. 1895, art. 5348.

²² Rev. St. 1898, § 2742.

²³ St. 1894, § 2353.

²⁴ Code, 1891, ch. 77, § 18.

²⁵ Ann. St. 1889, § 2284.

²⁶ Rev. St. 1883, p. 608, § 1.

²⁷ Rev. St. 1895, art. 5349.

²⁸ 1 Jarm. on Wills, *70; *Deakins v. Hollis*, 7 Gill & J. 311, 315; *Kerns v. Soxman*, 16 Serg. & R. 315, 317; *Cook v. Grant*, 16 Serg. & R. 198, 208; *Weems v. Weems*, 19 Md. 334, 344; *Nixon v. Armstrong*, 38 Tex. 296.

²⁹ *Haus v. Palmer*, 21 Pa. St. 296, 299, overruling *Search's Appeal*, 13 Pa. St. 108.

³⁰ Dig. of St. 1894, §§ 7437, 7438.

³¹ *Grimm v. Tittmann*, 113 Mo. 56, 63.

³² Code, 1887, § 3089.

³³ Attestation becomes valid if legatee die before probate of the will: *Gen. L. 1896*, p. 668, § 34.

³⁴ *Fisher v. Spence*, 150 Ill. 253.

³⁵ In case of nuncupative wills reduced to writing and attested by the witnesses; written wills are controlled by the statute: *Vrooman v. Powers*, 47 Oh. St. 191.

³⁶ *Allison v. Allison*, 4 Hawks, 141, 174; *Morton v. Ingram*, 11 Ired. 368, 370.

interest; hence a gift to the husband or wife of an attesting witness renders such witness incompetent, unless, under the law, such gift is void.¹ It was held in England that the statute of 25 Geo. II. did not avoid a gift to the husband or wife of an attesting witness;² in consequence whereof, by the Wills Act, the disqualification to take beneficially was extended to the husband or wife of an attesting witness. This feature of the English Act is incorporated into the statutes of Connecticut,³ Georgia,⁴ Massachusetts,⁵ South Carolina,⁶ Virginia,⁷ and West Virginia.⁸ In Iowa, under a general statute making husband and wife competent witnesses for each other, the wife of a legatee is held to be a competent attesting witness;⁹ and so also the husband of a devisee.¹⁰ So in Minnesota,¹¹ New Jersey,¹² and Texas¹³ it is held that under the statutes of these States the husband or wife of a legatee is a competent attesting witness, and that the legacy itself is not rendered void thereby.

Gift to husband or wife disqualifies,

but not if statute avoids such gift.

[* 76] * For the same reason, a devise or bequest not beneficial to the attesting witness does not disqualify him. A devise in trust to sell, or the devise of a power, does not constitute such an interest in the devisee as will either render him incompetent or avoid the devise.¹⁴ Whether a person nominated in the will as executor is a competent attesting witness, or general witness to prove the will, is negatived in Alabama,¹⁵ Delaware,¹⁶ and formerly in North Carolina;¹⁷ but affirmed, either on the ground that the

Gift not beneficial does not disqualify.

Executors as attesting witnesses.

¹ *Fisher v. Spence*, 150 Ill. 253; *Giddings v. Turgeon*, 58 Vt. 106, 111; *Sullivan v. Sullivan*, 106 Mass. 474; all these cases holding that the statutes (but which have since been amended, in this respect, in the two last-named States) avoid only beneficiary gifts to the attesting witnesses, not to any other person, although the attesting witness might incidentally take some benefit from the devise; and that therefore the person benefited by a devise, not himself or herself the devisee, is not a competent attesting witness. In the latter case, Gray, J., cites the cases of *Jackson v. Woods*, 1 Johns. Cas. 163; *Jackson v. Durland*, 2 Johns. Cas. 314, and *Winslow v. Kimball*, 25 Me. 493, all of them holding that the unity of husband and wife is such that if either be a witness to a will containing a devise to the other, such devise is void, and the witness therefore competent, dissenting from this view. See also authorities, *infra* (notes 9 to 11).

² *Hatfield v. Thorp*, 5 B. & Ald. 589, 595.

³ Gen. St. 1888, § 539.

⁴ In this State the husband may attest a will devising separate property to his wife, but his credibility is submitted to the jury: Code, 1895, § 3275.

⁵ Pub. St. 1882, p. 748, § 3.

⁶ Rev. St. 1893, § 1991.

⁷ Code, 1887, § 2529.

⁸ Code, 1891, p. 660, § 18.

⁹ *Hawkins v. Hawkins*, 54 Iowa, 443.

¹⁰ *Bates v. Officer*, 70 Iowa, 343.

¹¹ *Holt's Will*, 56 Minn. 33.

¹² *Lippincott v. Wikoff*, 54 N. J. Eq. 107.

¹³ *Gamble v. Butcher*, 87 Tex. 642.

¹⁴ *Tucker v. Tucker*, 5 Ired. L. 161, 165; *Peralta v. Castro*, 6 Cal. 354, 359; *Hogan v. Wyman*, 2 Oreg. 302.

¹⁵ *Gilbert v. Gilbert*, 22 Ala. 529, 532, on the ground that as the propounder he may be liable for costs.

¹⁶ *Davis v. Rogers*, 1 Houst. 44, 63.

¹⁷ *Morton v. Ingram*, 11 Ired. L. 368, 370, holding that a renunciation of the

commissions to which they are entitled constitute no "beneficial legacy," but are given as compensation for services rendered, or because they are rendered incompetent to assume the office, in Connecticut,¹ Florida,² Georgia,³ Kentucky,⁴ Maine,⁵ Maryland,⁶ Massachusetts,⁷ Mississippi,⁸ Missouri,⁹ New Hampshire,¹⁰ New Jersey,¹¹ New York,¹² North Carolina,¹³ Pennsylvania,¹⁴ South Carolina,¹⁵ and Vermont.¹⁶ In Kentucky it was held that a remote contingent interest in the provisions of a will does not disqualify an attesting witness from proving it; the interest in such case goes to the credit, and not to the competency, of the witness.¹⁷ In Maine neither a tax-paying inhabitant of a town to which a legacy is given, nor a stock-holder of a corporation which is a legatee, is incompetent as a subscribing witness to the will.¹⁸

In England a direction in a will that every trustee who was a solicitor should be entitled to charge for professional business done for the estate, was held to be void as to an attesting witness, on the ground that such provision gives him a right, which he would not otherwise have, to charge for the work if he does it, thus making it a beneficial gift.¹⁹ Where the testator selects his lawyer or physician as an attesting witness it will be deemed that he thereby waives all objection that might otherwise be made to such attorney or physician certifying to facts learned in his professional capacity.²⁰

Attorney or
physician as
attesting
witness.

trust will not remove the disqualification. The same rule is applied in this State to the wife of an executor: *Huie v. McConnell*, 2 Jones, L. 455, 457, overruling *Daniel v. Proctor*, 1 Dev. 428; but the rule is now changed in this State: *Verter v. Collins*, 101 N. C. 114.

¹ *Hawley v. Brown*, 1 Root, 494 (executor having renounced).

² *Meyer v. Fogg*, 7 Fla. 292, 294.

³ *Baker v. Bandroft*, 79 Ga. 672.

⁴ *Orndorf v. Hummer*, 12 B. Mon. 619.

⁵ *Jones v. Tibbetts*, 57 Me. 572; *Jones v. Larrabee*, 47 Me. 474, 480. For the same reason, the wife of an executor is a competent attesting witness: *Piper v. Moulton*, 72 Me. 155, 158.

⁶ *Dorsey v. Warfield*, 7 Md. 65, 75 (as a general witness, having renounced the executorship); *Estep v. Morris*, 38 Md. 417, 423.

⁷ *Wyman v. Symmes*, 10 Allen, 153.

⁸ *Rucker v. Lambdin*, 12 Sm. & M. 230. 254; *Kelly v. Miller*, 39 Miss. 17, 59.

⁹ *Murphy v. Murphy*, 24 Mo. 526.

¹⁰ *Stewart v. Harriman*, 56 N. H. 25, 27, holding wife of executor also competent.

¹¹ *Lippincott v. Wikoff*, 54 N. J. Eq. 107.

¹² *McDonough v. Loughlin*, 20 Barb. 238, 245, approved in *In re Wilson*, 103 N. Y. 374, 376.

¹³ *Verter v. Collins*, 101 N. C. 114.

¹⁴ *Frew v. Clarke*, 80 Pa. St. 170, 179, affirming *Bowen v. Gorauffo*, 73 Pa. St. 357; *Jordan's Estate*, 161 Pa. St. 393.

¹⁵ *Harleston v. Corbett*, 12 Rich. 604; *Noble v. Burnett*, 10 Rich. 505, 519, holding the statute of 25 Geo. II. to apply, avoiding any beneficial interest of the executor.

¹⁶ *Richardson v. Richardson*, 35 Vt. 238, 240.

¹⁷ *Berry v. Hamilton*, 10 B. Mon. 129, 138.

¹⁸ *Marston*, Petitioner, 79 Me. 25, 45, 50.

¹⁹ *In re Pooley*, L. R. 40 Ch. D. 1.

²⁰ *In re Mullin*, 110 Cal. 252, 256; *In re Coleman*, 111 N. Y. 220; *Pence v. Waugh*, 135 Ind. 143, 152; *In re Wax*, 106 Cal. 343, and cases cited; *Denning v. Butcher*, 91 Iowa, 425, 435.

§ 42. Wills valid as to Personal, but not as to Real Property. —

In most States the statutes make no distinction in respect of [*77] *form between wills disposing of personal and those disposing of real property, except as to holographic and nuncupative wills, which will be considered hereafter;¹ but in some of them personal property may be bequeathed by nuncupative will.² In Maryland³ (until the recent change in the statute requiring the same formality for all wills⁴) and in Tennessee,⁵ there is no statute on the subject of wills of personalty, hence the common law is applicable to them in these States; and it follows that, as in England before the statute of 1 Vict., so in these States, a will held inoperative to convey real estate for want of the requisite formalities may yet be good to bequeath personal property.⁶ Thus a will conveying both real and personal property, left in an unfinished state, is void as to either class of property if it appear that the testator left it unfinished while he was still deliberating upon its contents; but if it appear that he intended the paper, in the form in which it was found, to constitute his will, and was prevented from completing it by the act of God alone, then it may operate as a valid will of personal property, although no real property can pass by it.⁷

In some States wills may be valid as to personal, and void as to real, estate.

In many of the States personal property to a limited amount may be bequeathed by will differing in essential respects as to attestation, form, etc., from wills devising real estate, or bequeathing personal estate of greater value. These will be considered in connection with nuncupative wills.⁸

The distinction between wills disposing of real and such as dispose of personal property is important also in connection with the domicile of the testator; for while the former must conform to the *lex rei sitæ*, the latter are in most States held good if in accordance with the law of the testator's domicile, or of the State

¹ The States making no distinction in the form and execution of wills of real and of personal property are Alabama, Arkansas, California, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia, West Virginia, and Wisconsin.

² As to which see *post*, § 44.

³ Hinck. Test. L. § 69. The common law of England was said to be in force as to the testamentary disposition of personal property: *Ib.* § 85.

⁴ Publ. L. 1888, art. 93, § 310; all wills must now be in writing, signed by the testator, and attested by two witnesses: *Trustees v. College*, 75 Md. 188.

⁵ *Franklin v. Franklin*, 90 Tenn. 44; *Moore v. Steele*, 10 Humph. 562, 565; *Williams v. Saunders*, 5 Coldw. 60, 69. See compilers' note, Stat. of Tenn., Code, 1884, § 3003.

⁶ *Guthrie v. Owen*, 2 Humph. 202, 217; in Maryland before the change of the statute: *Byers v. Hoppe*, 61 Md. 206.

⁷ *Devecmon v. Devecmon*, 43 Md. 335, 344, *et seq.* But the law is otherwise now; see note 4, *supra*.

⁸ See *post*, § 44.

*or country where made, or where the property may be found. [*78] This aspect of the subject is discussed elsewhere.¹

§ 43. **Holographic Wills.**—Holographic (or olographic) wills, written wholly by the testator in person, differ from ordinary wills only in requiring less or no formality of attestation. Provision is made for such in the statutes of many States. They are admitted to probate upon proof of having been written by the testator in Arkansas,² California,³ Kentucky,⁴ Louisiana,⁵ Mississippi,⁶ North Carolina,⁷ Tennessee,⁸ Texas,⁹ Virginia,¹⁰ and West Virginia.¹¹

The validity of holographic wills without attestation of any kind renders it difficult, sometimes, to determine whether the deceased intended the paper propounded for probate to constitute his last will in the form in which it is found. Hence it is provided in the statutes of North Carolina and Tennessee that such wills, to be valid, must be found among the valuable papers of the deceased, or lodged with some person for safe keeping.¹² If the paper is imperfect, as where it contains an attestation clause not signed, or leaving blanks, the presumption is against its validity; but proof of intention may be given, in rebuttal of such presumption, that the deceased abandoned the intention he once had of giving effect to *the [*79] paper, or that he meant it to operate in its then condition, or that he was in the progress of finishing it, and prevented by the act

¹ See *post*, ch. xvii., § 168; and also § 226.

² Dig. of St. 1894, § 7392, pl. 5. Proof of handwriting must be made by three disinterested witnesses.

³ Civ. Code, § 1277; without other formality, whether it be made within or out of the State.

⁴ St. 1894, § 4828, excepting holographic wills from the requirement of attestation. But such a will must be signed by the testator at its conclusion like an ordinary will: *Jones v. Jones*, 3 Metc. (Ky.) 266, 270.

⁵ Voorhies' Rev. Civ. Code, 1889, art. 1588. The only requirement is, whether made in or out of the State, that it must be entirely written, dated, and signed by the testator.

⁶ Ann. Code, 1892, § 4488, excepting holographic wills signed by the testator from the requirement of attestation.

⁷ If found among the valuable papers and effects of the deceased, or lodged with some person for safe keeping, and proved by three credible witnesses to be in the

handwriting of the deceased in all its parts: Code, 1883, § 2136; *Brown v. Eaton*, 91 N. C. 26.

⁸ Rev. St. 1884, § 3004. Under same conditions as in North Carolina; see *supra*, note 7. As to the *quantum* of proof required to probate an unattested will, see *Franklin v. Franklin*, 90 Tenn. 44.

⁹ Rev. St. 1895, § 5336, excepting holographic will from requirement of attestation.

¹⁰ Code, 1887, § 2514.

¹¹ Code, 1891, ch. 77, § 3.

¹² *Supra*, notes 7 and 8. It must be proved, in addition thereto, that the paper was so deposited or lodged for safe keeping with the intent that it should operate as his will; and by three witnesses, not only that it is in the handwriting of the deceased, but also that his handwriting was generally known among his acquaintances: *Hooper v. McQuary*, 5 Coldw. 129, 130, *et seq.*; *Marr v. Marr*, 2 Head, 303; *Tate v. Tate*, 11 Humph. 465; *Crutcher v. Crutcher*, 11 Humph. 377, 380.

of God.¹ And in Virginia a will wholly written by the testator and signed by him, containing an attestation clause unsigned by witnesses, was held to be a valid holographic will.² In California, where there was no formal attestation clause, but the word "Witness" followed by name and address not in testator's handwriting, this was not regarded as invalidating a paper as a holographic will.³

It is held in Louisiana that the fact of names of witnesses being appended to the will neither invalidates it nor deprives it of its holographic character;⁴ and that the probate of it must be that required for holographic wills.⁵ The requirement of the code, that the holographic will shall be dated, is not complied with by giving the month and the year, leaving a blank for the day of the month; the omission cannot be supplied *aliunde*, and avoids the will.⁶ So it is held both in Louisiana and California that the statute is not complied with if any part of the date is printed.⁷ In California, if the name of the testator appear in the opening part of the will, it is valid without being subscribed;⁸ but that a paper printed in the form of a stationer's blank, with the vacant spaces filled in deceased's handwriting, is not a holographic will in whole or in part.⁹ Although the statutes of a State may refer to and recognize holographic wills, yet unless it dispenses with the necessity of witnesses, they must be proved by witnesses.¹⁰

§ 44. **Nuncupative Wills.**—Nuncupative wills, or testamentary declarations in presence of witnesses without any writing by the testator, were at common law of equal validity with written wills for the disposition of personal property.¹¹ By the Statute of Frauds several restrictions were placed upon them, "for the prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury."¹² The provisions of this statute, although rendered inoperative in England by the statute of 1 Vict. c. 26, which does away with nuncupative wills altogether, except as to soldiers and mariners in actual service, are still in force in most of the American States, with more or less modification.

The English Statute of Frauds affected such nuncupative wills only as disposed of property exceeding £50 in value; where the property

Nuncupative wills affected by English Statute of Frauds.

¹ *Forbes v. Gordon*, 3 Phillim. 614, 628; *Hill v. Bell*, Phillips L. 122, 124, citing *Harrison v. Burgess*, 1 Hawks, 384, and *Brown v. Beaver*, 3 Jones, 516, to same effect.

² *Perkins v. Jones*, 84 Va. 358, with a citation of authorities, Lewis, P., dissenting on the ground that the presumption was against the validity of the will.

³ *In re Soher*, 78 Cal. 477.

⁴ *Andrews v. Andrews*, 12 Mart. 713.

⁵ *Succession of Roth*, 31 La. An. 315, 317.

⁶ *Heffner v. Heffner*, 48 La. An. 1088.

⁷ *Robertson's Succession*, 49 La. An. 868; *Billing's Estate*, 64 Cal. 427.

⁸ *Johnson's Estate*, Myr. 5.

⁹ *Estate of Rand*, 61 Cal. 468.

¹⁰ *Neer v. Cowhick*, 4 Wyom. 49.

¹¹ *Wms. Ex.* [116].

¹² 29 Car. II. c. 3, § 19.

Restrictions of the statute apply to bequests exceeding certain amounts only.

bequeathed amounted to less, the common law still governed. In a number of States this principle was adopted, limiting the statutory restrictions on nuncupative wills to such as bequeath property exceeding a certain value; namely, \$300 in Maryland;¹ \$250 in Tennessee;² \$150 in Nebraska³ and Wisconsin;⁴

\$100 in Maine,⁵ * Mississippi,⁶ New Hampshire,⁷ and Penn- [* 80] sylvania;⁸ \$80 in New Jersey;⁹ \$50 in South Carolina;¹⁰ and \$30 in Texas.¹¹ But in some of these States slight changes from the common law affect all nuncupative wills, particularly in the mode of probate, which will appear in connection with the consideration of that subject.¹²

In other States nuncupative wills are permitted only for property not exceeding a certain value, fixed at \$1,000 in California¹³ and Nevada;¹⁴ at \$500 in Alabama¹⁵ and Arkansas;¹⁶ \$300 in Iowa¹⁷ and Michigan;¹⁸ \$200 in Delaware,¹⁹ Missouri,²⁰ and Vermont;²¹ and \$100 in Indiana.²² In these States, by force of their statutes, a nuncupative will disposing of property in excess of the amount so limited has been held void *in toto*.²³ In others again there is no limit to the amount of personal property which may be bequeathed by unwritten wills under the conditions imposed in the statutes. Among these are Colorado,²⁴ Florida,²⁵ Illinois,²⁶ Kansas,²⁷ Ohio,²⁸ North Carolina,²⁹ Pennsylvania,³⁰ South Carolina,³¹ Tennessee,³² Texas,³³ and Wisconsin.³⁴ Yet others limit the power to soldiers in actual service

¹ Code, 1878, p. 421, art. 49, § 10. But by the latest revision (Pub. Gen. L. 1888, p. 1418, § 318) nuncupative wills are wholly abolished in Maryland, saving, however, to soldiers and mariners power to dispose of personal estate as theretofore.

² Code, 1884, § 3006.

³ Cons. St. 1893, § 1187.

⁴ Ann. St. 1889, § 2292.

⁵ Rev. St. 1883, p. 610, § 20.

⁶ Ann. Code, 1892, § 4492.

⁷ Pub. St. 1891, ch. 196, § 17.

⁸ Pepper & Lewis' Dig. 1896, p. 1443,

§ 34.

⁹ Gen. St. 1896, p. 3759, § 11.

¹⁰ Rev. St. 1893, § 2008.

¹¹ Rev. St. 1895, § 5339.

¹² Post, §§ 45, 224.

¹³ Civ. Code, § 1289.

¹⁴ Gen. St. 1885, § 3004.

¹⁵ Code, 1896, § 4267.

¹⁶ Dig. of St. 1894, § 7404.

¹⁷ Iowa Code, 1897, § 3272.

¹⁸ 2 How. St. 1882, § 5790.

¹⁹ Laws, 1874, p. 509, § 5.

²⁰ Rev. St. 1889, § 8892.

²¹ St. 1894, § 2350.

²² Ann. St. 1894, § 2747.

²³ *Erwin v. Humner*, 27 Ala. 296, 299; *Stricker v. Oldenburgh*, 39 Iowa, 653. But a later Iowa case holds the will good for all but the excess: *Mulligan v. Leonard*, 46 Iowa, 692, 694.

²⁴ Mills' Ann. St., 1891, § 4654.

²⁵ Except slaves, which before their emancipation by President Lincoln were treated as real property: *McLeod v. Dell*, 9 Fla. 451, 455; Rev. St. 1892, § 1799.

²⁶ St. & Curt. St. 1896, ch. 148, § 15.

²⁷ Kans. Gen. St. 1897, p. 573, § 69.

²⁸ Rev. St. 1890, § 5991.

²⁹ Code, 1883, § 2148, ¶ 3.

³⁰ Pepper & L. Dig. 1896, p. 1443, § 34.

³¹ Rev. St. 1893, § 2008.

³² Code, 1884, § 3006.

³³ Rev. St. 1895, art. 5339.

³⁴ Ann. St. 1889, § 2292.

and mariners at sea; for instance, Kentucky,¹ Maryland,² Massachusetts,³ Minnesota,⁴ New York,⁵ Oregon,⁶ Rhode Island,⁷ [* 81] Virginia,⁸ and * West Virginia.⁹ But in Georgia¹⁰ the statute expressly authorizes all property, whether real or personal, to pass by verbal will;¹¹ and so in Louisiana,¹² whose testamentary system is largely borrowed from the civil law. The Texas statute providing for the disposition of "property" by nuncupative will is construed not to extend to real property.¹³

§ 45. **Statutory Regulations in Respect of Nuncupative Wills.**—The requisites for nuncupative wills are imported from the English Statute of Frauds into the statutes of most of the American States, with modifications to a greater or less extent. It is necessary that the words spoken by the testator be proved on oath by competent witnesses,¹⁴ "who were present at the making thereof." Most of them also require that the testator "bid the persons present, or some of them, bear witness that such was his will, or to that effect."¹⁵

Nuncupative wills must be proved by witnesses who were present at the making.

That the *rogatio testium*, or request of the testator to bear witness to the will he is about to pronounce, is an essential feature of all nuncupative wills, is nowhere doubted, even where the statute contains no express provision to that effect.¹⁶ But while it cannot be supplied by inference from the nuncupation itself,¹⁷ it is not necessary that particular words be used,

Testator must request witnesses to witness his will.

¹ St. 1894, § 4830.

² Pub. Gen. L. 1888, p. 1418, § 318.

³ Pub. St. 1882, p. 748, § 6.

⁴ Gen. St. 1891, § 5628.

⁵ 2 Banks & Bro. (9th ed., 1896) p. 1876, § 22.

⁶ There is a provision in the statutes of Oregon for nuncupative wills, which seems applicable to the common-law wills authorized to soldiers and mariners: see Hill's Ann. L. 1887, § 3079; also §§ 3080, 3081.

⁷ Gen. L. 1896, p. 666, § 20.

⁸ Code, 1887, § 2516.

⁹ Code, 1891, p. 659, § 5.

¹⁰ Code, 1895, § 3352.

¹¹ Brown v. Carroll, 36 Ga. 568; Caraway v. Smith, 28 Ga. 541.

¹² Code, art. 1570. See Wood v. Roane, 35 La. An. 865; Pfarr v. Belmont, 39 La. An. 294.

¹³ Moffett v. Moffett, 67 Tex. 642.

¹⁴ Except in Florida, Georgia, Maine, Nebraska, New Hampshire, New Jersey, South Carolina, Texas, and Wisconsin, in which States three witnesses are still required, the number is in others reduced

to two. In Alabama and Vermont the statute does not mention the number of witnesses in connection with nuncupative wills. In Louisiana from three to seven are required under the various circumstances mentioned in the statute. The witnesses must prove the words, substantially, as spoken, and on a contest it may be proved that the words spoken were different from those written by them, in which case the will is void: Bolles v. Harris, 34 Oh. St. 38, 40. See on the accuracy required: Hennesy v. Woulfe, 49 La. An. 1376.

¹⁵ This requirement seems to be omitted in California, Iowa, Massachusetts, Michigan, Minnesota, New York, Ohio, Oregon, Rhode Island, Vermont, Virginia, and West Virginia. It is contained, substantially, in the language of the English statute, in the other States.

¹⁶ Ridley v. Coleman, 1 Sneed, 616, 618; Brown v. Brown, 2 Murphy, 350; Broach v. Sing, 57 Miss. 115, 116; and see authorities in notes, *infra*.

¹⁷ Bundrick v. Haygood, 106 N. C. 468. Biddle v. Biddle, 36 Md. 630, 643, *et seq.*

or a literal compliance with the statute shown; any form of expression, however imperfectly uttered, so that it conveys to the minds of those to whom it is addressed the * idea that he desires [* 82] them, or some of them, to bear witness to the disposition he is about to make of his property, is sufficient.¹ It has been decided in Pennsylvania that a look is not a sufficient *rogatio testium*.² The *animo testandi* must be proved as clearly, and with the same certainty, at least, as in wills written and attested in writing.³ In some of the States the witnesses are expressly required by the statute to prove affirmatively that the testator, at the time of speaking the testamentary words, was of sound mind.⁴

“That such nuncupative will was made in the time of the last sickness of the deceased, in the house of his habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick being from his own home, and died before he returned to the place of his or her dwelling.” This provision has, of course, no application to soldiers or mariners; but with this exception has been substantially incorporated into the statutes of nearly all the States.⁵ The phrase “last sickness” is construed not to mean *in extremis* in Illinois⁶ and Tennessee,⁷ but otherwise in Georgia,⁸ Pennsylvania,⁹ Maryland,¹⁰ and New Jersey.¹¹ In Delaware such a will must be made within three days before the testator’s death, or under circumstances rendering it impossible to make a written will.¹²

The Statute of Frauds prohibits the introduction of any testimony to prove testamentary words after the expiration of six months from the time they were spoken, “except the said testimony, or the substance thereof, were committed

Sampson v. Browning, 22 Ga. 293, 301; Dawson’s Appeal, 23 Wis. 69, 88.

¹ Weir v. Chidester, 63 Ill. 453, 455; Arnett v. Arnett, 27 Ill. 247, 249; Mulligan v. Leonard, 46 Iowa, 692, 694, *et seq.*; Parkison v. Parkison, 12 Sm. & M. 672, 678; Hatcher v. Millard, 2 Coldw. 30, 33, *et seq.*; Smith v. Smith, 63 N. C. 637, 639, *et seq.*; Long v. Foust, 109 N. C. 114; Bourke v. Wilson, 38 La. An. 320.

² Will of Meisenhelter, 15 Phila. 651.

³ Gibson v. Gibson, Walk. 364; Phipps v. Hope, 16 Oh. St. 586, 595; Lucas v. Goff, 33 Miss. 629, 645.

⁴ So in Colorado, Illinois, Kansas, and Ohio.

⁵ The only exceptions, apparently, are Iowa, Louisiana, Michigan, and Vermont.

⁶ Harrington v. Steer, 82 Ill. 50, 54, Breese, J., dissenting, and citing Morgan

v. Stevens, 78 Ill. 287, as holding that the statute as to nuncupative wills must receive a rigid and strict construction.

⁷ Nolan v. Gardner, 7 Heisk. 215.

⁸ Scaife v. Emmons, 84 Ga. 619.

⁹ Boyer v. Frick, 4 Watts & S. 357, 360, where it is said that a nuncupative will is allowed only if made in such extremity of last sickness as precludes a written one: Yarnall’s Will, 4 Rawle, 46, 65. See the case of Prince v. Hazleton, 20 Johns. 502, 510, *et seq.*, for a review of the law of nuncupative wills on this point, before the restriction of such wills in New York to soldiers and mariners.

¹⁰ O’Neill v. Smith, 33 Md. 569, 573.

¹¹ Carroll v. Bonham, 42 N. J. Eq. 625, 627.

¹² Laws, 1874, p. 509, § 5.

[* 83] to writing within six days after the making of * said will."

While the substance of this provision is embodied in the statutes of most States, there is considerable diversity as to the time allowed for the reduction of the testamentary words into writing. The Statute of Frauds is precisely followed, in this respect, in Alabama,¹ Florida,² Maine,³ Mississippi,⁴ Nebraska,⁵ New Hampshire,⁶ New Jersey,⁷ South Carolina,⁸ Texas,⁹ and Wisconsin.¹⁰ In North Carolina and Tennessee ten days are allowed for its reduction to writing; if this is not done, it cannot be proved by the witnesses more than six months from the making.¹¹ In Georgia, thirty days are allowed. In some of the States there can be no probate after six months, nor unless the words be reduced to writing within a certain time, varying from three to thirty days.¹² In Nevada there can be no probate after three months. The provisions that there must be notice to the parties in interest (widow or next of kin), and that "no letters testamentary or probate of any nuncupative will shall pass the seal of any court till fourteen days at the least after the death of the testator be fully expired,"¹³ are generally applicable in all the States.

There must be notice to widow and next of kin.

Nuncupative wills are watched by the courts with a jealous eye. Aside from the statutory restrictions placed upon them, the ease with which frauds may be accomplished in establishing them demands close scrutiny of the testimony offered, and strict proof of every fact upon which their validity is made to depend.¹⁴ Where several witnesses are required by the statute, each one must prove all the facts,¹⁵ and all must be present at the same time.¹⁶

Nuncupative wills not favored in law.

It has sometimes been held, that instructions for the drawing of a written will, declared before the requisite number of witnesses, [* 84] may constitute a valid nuncupative will where the testator * is by the act of God rendered incapable of completing it in the

¹ Code, 1896, § 4271.

² Rev. St. 1892, § 1800.

³ Rev. St. 1883, p. 610, § 19.

⁴ Ann. Code, 1892, § 4493.

⁵ Cons. St. 1893, § 1188.

⁶ Pub. St. 1891, ch. 186, § 17.

⁷ Gen. St. 1896, p. 3759, § 12.

⁸ Ann. St. 1889, § 2293.

⁹ Rev. St. 1895, § 5341.

¹⁰ Ann. St. 1889, § 2293.

¹¹ If reduced to writing within ten days, it may be probated, it seems, at any time; but if not so put in writing within ten days, it cannot be proved after the expiration of six months from the time of making: Haygood's Will, 101 N. C. 574; Code, Tennessee, 1884, § 3007.

¹² So in Arkansas, California, Georgia, Indiana, Kansas, Missouri, Ohio, and Vermont. In Pennsylvania within six days: Taylor's Appeal, 47 Pa. St. 31, 36.

¹³ § 21 of 29 Car. II. c. 3.

¹⁴ Dorsey v. Sheppard, 12 Gill & J. 192, 198; Werkheiser v. Werkheiser, 6 Watts & S. 184. 189; Parsons v. Parsons, 2 Me. 298, 300; Bundrick v. Haygood, 106 N. C. 468.

¹⁵ Morgan v. Stevens, 78 Ill. 287; Mitchell v. Vickers, 20 Tex. 377, 384; Haus v. Palmer, 21 Pa. St. 296, 299; Lucas v. Goff, 33 Miss. 629, 645.

¹⁶ Tally v. Butterworth, 10 Yerg. 501. But see, *contra*, Portwood v. Hunter, 6 B Mon. 538.

mode contemplated by him ;¹ at least where it appears from all the circumstances in the case that it contains the final wish and intention of the testator respecting the property bequeathed.² But this doctrine — which is but the statement of the common-law rule in regard to wills of personal property (not required to be in writing) whereby the presumption arising against an unfinished written will might be rebutted³ — must be understood as being governed by the statutory provisions on the subject, and not as giving effect to an incomplete written will, or to the memorandum of a scrivener, or the proof by witnesses of instructions received for the preparation of such, unless all the formalities prescribed for a nuncupative will have also been complied with.⁴

§ 46. **Wills of Soldiers and Mariners.** — Wills made by soldiers in actual military service and mariners at sea are construed with

Wills by soldiers in service and mariners at sea construed with greater liberality.

greater liberality than nuncupative wills of other persons. By the civil law the ordinary formalities of executing nuncupative wills were dispensed with in favor of soldiers; their wills were held valid, although they should neither call the legal number of witnesses, nor

observe any other of the ordinary solemnities in the execution of such instruments.⁵ This privilege was also extended to the naval service;⁶ and has been generally adopted among civilized nations, coming to us through the common law, left substantially unaffected by the English Statute of Frauds. The War of the Rebellion has given rise to numerous cases involving the validity of soldiers' wills, and it may be said that courts look upon them with as much favor as with disfavor upon the unwritten wills of others.

In the absence of statutory regulations on the subject, the usual

Conditions to nuncupative wills not applicable.

conditions to nuncupative wills are not applicable to the wills of soldiers or mariners; the single question being whether the deceased comes within * the class [* 85]

of persons under consideration; namely, whether he was a sol-

Who is a soldier,

dier in actual service or a mariner at sea.⁷ It is held on this point that the term "soldier" embraces every grade,

from the private to the highest officer, and includes the gunner, the

¹ *Mason v. Dunman*, 1 Munf. 456, 459; *Offutt v. Offutt*, 3 B. Mon. 162; *Booster v. Rogers*, 9 Gill, 44, 53; *Phœbe v. Bogges*, 1 Gratt. 129, 142.

² *Frierson v. Beall*, 7 Ga. 438, 441.

³ *Wms. Ex.* [69].

⁴ *Dockum v. Robinson*, 26 N. H. 372, 381, *et seq.*; *Reese v. Hawthorn*, 10 Gratt. 548, 550; *Hebden's Will*, 20 N. J. Eq. 473, 476; *Male's Case*, 49 N. J. Eq. 266 (denying that such a document can have

the effect of establishing a nuncupative will), 282.

⁵ 1 Redf. on Wills, 193, pl. 18, citing *Inst. lib. 2, tit. 11.*

⁶ *Ex parte Thompson*, 4 Bradf. 154, 157. The opinion in this case contains a concise review of the history of nuncupative wills by Surrogate Bradford, which may be consulted with profit by those interested in the question of unwritten wills.

⁷ *Ex parte Thompson*, *supra*, p. 158.

surgeon, or the general;¹ and the term "mariner" applies to every person in the naval service, from the common or mariner. seaman to the captain or admiral.² But it does not include mariners, though at sea, who are so as passengers,³ nor soldiers in time of peace, or when not in actual service.⁴ But by actual service is not meant that he should be engaged in or on the eve of a battle; if he is in the enemy's country, or under military orders, whether in camp or campaign service, he is in *actual* military service;⁵ and so if he be at the time in a hospital.⁶

It may be repeated here, that, in the absence of statutory provisions to the contrary, the nuncupative will of soldiers and mariners may be proved, like wills of personalty at common law, by one witness.⁷

§ 47. **Codicils.** — A codicil is some addition to or qualification of a last will. Whatever may have been the origin of this species of testamentary disposition, they have, in America, no other function or office, and are governed by the same rules, and must be executed with the same formalities, as the wills themselves of which they form a constituent part.⁸ It [* 86] is * *prima facie* dependent upon the will; the destruction or mutilation of the will is an implied revocation of the codicil.⁹

One of the most important offices which a codicil may perform, as part of a pre-existing will, is the effect ascribed to it of confirming or republishing such will. Being, in law, part of a man's will, whether so described in the codicil or not, or whether or not expressly

¹ *Ex parte* Thompson, *supra*, p. 159, citing *In the Goods of Donaldson*, 2 Curt. 386; *Shearman v. Pyke*, reported in *Drummond v. Parish*, 3 Curt. 539; *Re Prendergast*, 5 Notes of Cas. 92.

² *Ex parte* Thompson, *supra*, citing *Morrell v. Morrell*, 1 Hagg. 51; *In the Goods of Hayes*, 2 Curt. 338. Including a cook: 4 Bradf. 159.

³ *Warren v. Harding*, 2 R. I. 133, 138; a mariner is "at sea" on a coasting vessel, though anchored in an arm of the sea where the tide ebbs and flows: *Hubbard v. Hubbard*, 8 N. Y. 196, 199; but not on the Mississippi River: *Gwin's Will*, 1 Tuck. 44.

⁴ *Leathers v. Greenacre*, 53 Me. 561, 571, citing *Drummond v. Parish*, 3 Curt. 522; *White v. Repton*, 3 Curt. 818; *In the Goods of Hill*, 1 Robertson, 276. And see *Smith's Will*, 6 Phila. 104, holding that a soldier at home on furlough is not within the statute.

⁵ *Van Deuzer v. Gordon*, 39 Vt. 111, 119.

⁶ *Gould v. Safford*, 39 Vt. 498, 507.

⁷ *Goods of White*, 22 L. Rep. 110, 114; *Gould v. Safford*, 39 Vt. 498; *Ex parte* Thompson, 4 Bradf. 159.

⁸ "A codicil, duly executed, is an addition or supplement to a will, and is no revocation thereof except in the precise degree in which it is inconsistent therewith, unless there be words of revocation. And it is an established *prima facie* rule of construction, that an additional legacy given by a codicil is attended with the same incidents and qualities as the original legacy. Upon the same principle, a devise upon condition that the devisee shall comply with what is enjoined upon him by the will must be construed, *prima facie*, to be upon condition that the devisee shall also comply with what may be enjoined upon him by any codicil": *Tilden v. Tilden*, 13 Gray, 103, 108. *Thompson v. Churchill*, 60 Vt. 371; see, as to cumulative and substituted legacies, *post*, § 445, p. * 972.

⁹ *Wms. Ex.* [154] and authorities.

Effect of codicil. confirmatory of it, it furnishes conclusive evidence of the testator's considering his will as then existing,¹ whether cancelled by obliteration (if it continues to be legible) or otherwise.² And for the same reason it operates to establish a will which would be void for want of compliance with the law regulating its execution and attestation,³ because the codicil, speaking and operating from the time of its execution, brings the will to it and makes it a will from the date of the codicil.⁴ The codicil, to have such effect, must self-evidently refer to the will with sufficient certainty to identify it;⁵ but it is not essential that the two papers be annexed together, or that the codicil be written on the same paper or parchment with the will.⁶ But if there are several wills of different dates, the circumstance of annexation is powerful to show that it was intended as a codicil to the will to which it is annexed, and to no other.⁷ If not annexed to any will, the codicil, where no express date is mentioned, refers to the will latest in date; if there is, to that of the date expressed.⁸

The presumptions pointed out yield, of course, to any express *or plainly inferable intention of the testator. A [* 87] codicil does not republish any part of a will which is inconsistent with the codicil,⁹ but necessarily revokes it;¹⁰ nor does it necessarily operate as if the will had originally been made at the date of the codicil.¹¹

¹ Wms. Ex. [212], with numerous English authorities.

² A will revoked by a later will may be republished by a codicil executed with the ceremonies required by the statute: *Ruffin, C. J.*, in *Love v. Johnston*, 12 Ired. L. 355, 362; *Jones v. Hartley*, 2 Whart. 103, 110, citing *Havard v. Davis*, 2 Binn. 406, 414, 418; *Brown v. Clark*, 77 N. Y. 369, 374.

³ *Rose v. Drayton*, 4 Rich. Eq. 260; *Burge v. Hamilton*, 72 Ga. 568, 622, 626; *McCurdy v. Neall*, 42 N. J. Eq. 333, 336; *Murfield's Estate*, 74 Iowa, 479; *Barney v. Hayes*, 11 Mont. 99, 106.

⁴ *Murray v. Oliver*, 6 Ired. Eq. 55; *Stover v. Kendall*, 1 Coldw. 557, 560; *Payne v. Payne*, 18 Cal. 291, 302; *In re Ladd*, 94 Cal. 670; *Jones v. Shewmaker*, 35 Ga. 151, 156, approved in *Burge v. Hamilton*, 72 Ga. 568; *Haven v. Foster*, 14 Pick. 534, 540; *York v. Walker*, 12 Mees. & W. 591, 599; *Cliett v. Cliett*, 1 Tex. Unrep. Cas. 408, 417, *et seq.*; *Cantfield v. Crandall*, 4 Dem. 111, 119.

⁵ *Utterton v. Robins*, 1 Ad. & El. 423, 427.

⁶ *Harvey v. Chouteau*, 14 Mo. 587, 595, citing numerous English and American authorities; *Pope v. Pope*, 95 Ga. 87.

⁷ *Rogers v. Pittis*, 1 Add. 30, 41.

⁸ *Crosbie v. McDoual*, 4 Ves. 610, 615.

⁹ *Per Gould, J.*, in *Simmons v. Simmons*, 26 Barb. 68, 75: "Between a codicil and a subsequent will there is this difference of construction: a codicil is a republication and ratification of so much of the prior will as it does not revoke; whereas a new will (if it provides for a full disposition of all the testator's estate), though inconsistent but *in part* with the former will, and absolutely agreeing in part, revokes the whole of the prior will, by substituting a new and last disposition for the former one." *Brant v. Willson*, 8 Cow. 56, 57; *Larrabee v. Larrabee*, 28 Vt. 274, 278; *Neff's Appeal*, 48 Pa. St. 501, 507; *Jones v. Jones*, 2 Dev. Eq. 387, 390.

¹⁰ *Snowhill v. Snowhill*, 23 N. J. L. 447, 454. See cases *post*, § 50, p. * 96, note 9.

¹¹ *Per Lord Chancellor Campbell* in *Hopwood v. Hopwood*, 7 H. L. Cas. 728, 740; *Kendall v. Kendall*, 5 Munf. 272, 275; *Appeal of Carl*, 106 Pa. St. 635.

[* 88]

* CHAPTER VI.

OF THE REVOCATION OF WILLS.

§ 48. **Revocation by Cancelling, Obliterating, Burning, etc.** — The power to revoke a will is self-evidently coextensive with the power to make one. It follows from the ambulatory quality of the instrument that a later will supplants a former one precisely to the extent to which the later is inconsistent with the former. It is always the *last* will and testament which is valid.

A valid later revokes a former will.

But revocation may be effected by other means, if the testator do not wish a mere alteration or change in the shape of his testamentary disposition, but an entire revocation, leaving it to the law to regulate the descent of his property. In such case the revocation is accomplished by the cancellation or destruction of the will, without more.

Revocation by cancellation or destruction.

Revocation also follows, by operation of law, from any subsequent act of the testator inconsistent with the devise or bequest, or from changes in the family relations of the testator arising after the execution of the will, unless by some act of the testator or provision in the original will the presumption of law is rebutted. Hence the subject of revocation of wills, whether by act of the testator himself or by operation of law, is the occasion of many statutory enactments and legal rules, and occupies much space in the books treating of wills.

By operation of law.

The statutory enactments in most States follow the language, or re-enact the substance, of the English Statute of Frauds in respect of the revocation of wills by act of the testator, which provides that "no devise in writing of any lands, tenements, or hereditaments, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his direction or consent," etc.¹ But the testator may, by his will, confer upon another the power to change or cancel any gift or devise made therein; and the exercise of such power of appointment is not a revocation within the meaning of such statute.²

Statutory provisions.

[* 89] * To effect a revocation by cancelling, burning, etc., it must, of course, be done with the intention and for the purpose of revok-

¹ 29 Car. II. c. 3, § 6.

² Dudley v. Weinart, 93 Ky. 401.

No revocation by testator without intention to revoke.

ing. This is so expressed in the statutes of most States authorizing a revocation in this method. If, therefore, the act of destruction was not committed *animo revocandi*, but by accident,¹ mistake,² during a fit of insanity,³ or

where the destruction is the effect of handling or wear,⁴ it is not the testator's act, and does not affect the validity of the will destroyed, if its contents can be ascertained.⁵ For the same reason, a revocation obtained by undue influence on the mind of the testator is inoperative, and leaves the will in full force.⁶ Nor is the intention,

Nor by mere intention, without act of revocation.

purpose, or desire to revoke an existing will of any effect on its validity, unless the desire is carried into effect by some act done, recognized in law as a sufficient indication of the testator's will.⁷

Effect of killing a testator to prevent revocation of a will.

It was held in a New York case that there was no revocation, although a devisee killed the testator in order to prevent it, and that such devisee took under the will;⁸ but the Court of Appeals reversed this decision, holding that the beneficiary, by reason of his crime, was barred of all interest in the estate of the testator.⁹ In a subsequent case the

¹ *Burtonshaw v. Gilbert*, 1 Cowp. 49, 52; *Giles v. Warren*, L. R. 2 P. & D. 401.

² *Burns v. Burns*, 4 Serg. & R. 295.

³ An insane person can have no *animo revocandi*: *Lang's Estate*, 65 Cal. 19; *Smith v. Wait*, 4 Barb. 28, 30; *Ford v. Ford*, 7 Humph. 92, 102; *Forman's Will*, 54 Barb. 274, 298; *Forbing v. Weber*, 99 Ind. 588. And see *post*, § 221.

⁴ 1 Redf. on Wills, 314, pl. 21, citing *Bigge v. Bigge*, 3 Notes of Cas. 601, 603; *Clarke v. Scipps*, 2 Rob. 563.

⁵ As to the proof necessary to establish a lost will, see *post*, § 221, and cases there cited.

⁶ *Rich v. Gilkey*, 73 Me. 595, 601; *Voorhees v. Voorhees*, 39 N. Y. 463.

⁷ *Runkle v. Gates*, 11 Ind. 95, 99; *Clark v. Smith*, 34 Barb. 140, 142, *et seq.*; *Gains v. Gains*, 2 A. K. Marsh. 190; *Means v. Moore*, 3 McC. 282, 286; *Hoitt v. Hoitt*, 63 N. H. 475, 495; *Wright v. Wright*, 5 Ind. 389; *Delafield v. Parish*, 25 N. Y. 9, 21; *Boyd v. Cook*, 3 Leigh, 32; *Blanchard v. Blanchard*, 32 Vt. 62, 64; *Hise v. Fincher*, 10 Ired. L. 139; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Woodfill v. Patton*, 76 Ind. 575, 579. Hence it is not a sufficient revocation for the testator to write upon the will "I revoke this will," and signing his name thereto with the date, unless such

writing is also attested by witnesses, as required for the execution of wills: *Will of Ladd*, 60 Wis. 187. And where a testatrix was about to burn a will contained in an envelope, intending to revoke it, but a third person fraudulently and unknown to the testatrix removed the will before the burning of the envelope, leaving the testatrix to believe that the will had been destroyed, it was held that there had been no revocation, and the will was probated: *Graham v. Burch*, 47 Minn. 171, 174, citing authorities to the effect that revocation does not take place, although the formal act is defeated by fraudulent devices. The cancelling of two parts of a triplicate will is, however, a revocation of the whole will: *Biggs v. Angus*, 3 Dem. 93; and the destruction, *animo revocandi*, of one of the two originals of a will executed in duplicate, there being no proof that the other was in the possession of the maker, destroys the whole will: *Asinari v. Bangs*, 3 Dem. 385. See also *Snider v. Brooks*, 84 Ala. 53, 58 (referred to *infra*, pp. *91-92, § 48), as to the presumptions arising in case of destruction of one of several duplicates.

⁸ *Preston v. Palmer*, 42 Hun. 368.

⁹ *Riggs v. Palmer*, 115 N. Y. 506, JJ Gray and Danforth dissenting.

court points out that the gift to the guilty beneficiary is not void *per se*, by reason of his crime, but that the will is valid, and the remedy is equitable and injunctive to prevent him from claiming the fruit of his crime.¹

Cancellation by the testator raises the presumption that the act was *animo revocandi*,² which may, however, be rebutted by proof of circumstances inconsistent [* 90] with * such intention,³ and the declarations of the testator at any time after the making of the will are competent for this purpose.⁴ But where the statute provides the manner in which a will may be revoked, that manner must be pursued;⁵ and the drawing of a line over the signature, neither obliterating it nor rendering it illegible, has been held not to constitute a destruction of the will under a statute authorizing a revocation by cancelling, the cancellation being witnessed in the same manner as the making of a new will,⁶ and in such case the declarations of the testator are not admissible to prove a revocation.⁷

Cancellation presumptive of intention to revoke.

Declarations competent to explain cancellation.

But not to contravene a statutory provision.

So the cancellation of a will, or of part of a will, made with the in-

¹ Ellerson v. Wescott, 148 N. Y. 149. The better reason seems to be with the original decision by the lower court; for by whatever theory the will is rendered inoperative, the fact remains that the testator has not revoked it, and that the court have substituted their own will for that of the testator. A similar case was decided by Surrogate Bradford, in which he held that where a testator was prevented from adding a codicil to his will by the refusal of the principal beneficiary therein, who had it in his custody, to produce it at the testator's request, for the purpose of alteration, such will was not thereby rendered invalid: Leaycraft v. Simmons, 3 Bradf. 35. The surrogate put his decision upon the ground that the mere intention to revoke, however well authenticated, or by whatever means defeated, is not sufficient. The intention, to be effectual, must be actually carried into execution. This case was cited and commended by Gray, J., dissenting in the case of Riggs v. Palmer, *supra*, and remarking that Surrogate Bradford's opinions are entitled to the highest consideration. To same effect: Gains v. Gains, 2 A. K. Marsh. 190. See the reasoning and authorities cited on the cognate point of descent to an heir who murdered the an-

cestor with the view of possessing himself of the estate, *post*, § 64.

² Smock v. Smock, 11 N. J. Eq. 156, citing numerous English authorities.

³ Goods of Colberg, 2 Curt. 832; Perkes v. Perkes, 3 B. & Al. 489; Idley v. Bowen, 11 Wend. 227, 236; Wolf v. Bolinger, 62 Ill. 368, 372.

⁴ Patterson v. Hickey, 32 Ga. 156, 160; Lawyer v. Smith, 8 Mich. 411, 423; Collagan v. Burns, 57 Me. 449, 458, *et seq.*; Tynan v. Paschall, 27 Tex. 286, 300; Johnson's Will, 40 Conn. 587; Yount v. Yount, 3 Grant's Cas. 140; Law v. Law, 83 Ala. 432, 434, holding such evidence admissible to show a revocation of the whole, but not of a part of the will, and commenting on the difference between the Alabama and the English statute.

⁵ Gay v. Gay, 60 Iowa, 415, citing Wright v. Wright, 5 Ind. 391; Runkle v. Gates, 11 Ind. 95; Blanchard v. Blanchard, 32 Vt. 62; Gains v. Gains, 2 A. K. Marsh. 190.

⁶ Gay v. Gay, *supra*, citing English authorities. The destruction or cancellation of any essential formal part of the will is usually, however, held to operate a total revocation of the will: see next section and authorities cited there.

⁷ *Ib.*, citing Jackson v. Kniffen, 2 Johns. 31, and other authorities.

Cancellation as a step toward a new will which fails, deemed no revocation.

Dependent relative revocation.

extended to

Applied to cancellation under mistake of law or fact.

tention to execute a new will (as a step in the process of effecting a change in the testamentary disposition already made), will not be deemed a revocation, if the purpose of the testator fails.¹ This principle is stated by Williams to have resulted in "the doctrine of dependent relative revocations, in which the act of cancelling, etc., being done with reference to another act, meant to be an effectual disposition, will be a revocation or not, according as the relative act be efficacious or not."² It has been

include, as inoperative, *cancellations made under [* 91] the influence of a mistake in point of law, as well as in point of a fact.³ This seems to carry the doctrine as far as the most lenient indulgence and anxious solicitude to give effect to the intention of testators, unlearned in

the law or misled as to facts, can safely permit. It is obvious that to ignore a plain act of cancellation upon the ground that the testator coupled it with an intention to make some other will, is to destroy the testator's right and to ignore his will; for it is none the less his will to undo what he has done in a former will, because he contemplates giving a different effect, by some later action, to the direct consequence of a simple revocation. If a testator, for instance, coming to the conclusion that the legatee in his will is undeserving of his bounty, contemplates the substitution of some other person as legatee, but cancels his will before determining who such person shall be, it would not only be making a will for the testator, if the cancellation were held inoperative, but to make such a will contrary to the expressed intention of the testator. The testator, by his act of cancellation, has substituted the heir at law, or it may be a residuary legatee, for the legatee whose legacy he has cancelled; but if

¹ "It is fairly inferable, where the act of cancellation is associated with another upon which it is dependent, and which fails of effect, the *prima facie* presumption of an intent to revoke is rebutted, and another presumption arises, 'that the cancellation or obliteration would not have been done, but in subserviency to the different testamentary disposition, which has failed';" *per* Smith, C. J., in *Hairston v. Hairston*, 30 Miss. 276, 305; *Onions v. Tyrer*, 2 Vern. 741; *Hyde v. Hyde*, 1 Eq. Cas. Abr. 409; *Johnson v. Brailsford*, 2 Nott & McC. 272, 276; *Pringle v. McPherson*, 2 Brev. 279, 289; *Wolf v. Bollinger*, 62 Ill. 368, 373; *Wilbourn v. Shell*, 59 Miss. 205, 207; *Williams, C. J.*, in *Youse v. Forman*, 5 Bush, 337, 345; *Dower v. Seeds*, 28 W. Va. 113, 138. So, also, it is held that a

legacy or devise which is declared to be revoked on the expressed ground of the existence of a state of facts, when in reality the testator is mistaken and these facts do not exist, and when it appears that the legacy or devise would not have been revoked but for such mistake of fact; in such case the revocation is held conditioned on the truth of such facts and is inoperative: see on this point *post*, § 51, p. *96.

² *Wms. Ex* [148], with English and American authorities by Perkins; and see 1 *Jarm. on Wills*, *135, and *Bigelow's* note (3) with numerous American cases; also *Goods of Thornton*, L. R. 14 Prob. D. 82.

³ *Perrott v. Perrott*, 14 East, 423, 438, *et seq.*; and see cases cited in *Wms. on Ex.* [153], note n.

the cancellation is inoperative, the legacy will go to the very person to whom the testator intends it not to go. Hence American courts will not refuse to give effect to cancellations made with the intention of making some other will, provision, or codicil, where the cancellation constitutes a complete act by itself.¹

But not in America, where the act of cancellation is complete.

The presumption of destruction *animo revocandi* arises also when a will, which has been traced to the testator's possession, cannot be found after his death or is found torn; but this presumption may be rebutted by evidence showing a contrary or different purpose.² But if the will was shown to be out of the testator's possession, the party asserting the fact of revocation must show that it came again into his custody, or was actually destroyed by his direction. If the will is executed in duplicate, the testator destroying the only one of the duplicates in his possession, a presumption of destruction *animo revocandi* arises, but is weakened if both were in his possession and only one destroyed.³

Will not found after testator's death presumed to be revoked.

[* 92] * The destruction of a will by a person other than the testator, without his knowledge and direction, does not, of course, affect the legal validity of such instrument, *à fortiori*, if the destruction took place after his decease;⁴ but this can be true only if the will can be established in its original form. If, for instance, a legacy be obliterated by a stranger, or inserted by interlineation, or changed in effect or amount, and the original legacy be known, it may be proved as it originally stood. If made by the legatee himself, it will avoid the legacy so altered, but it cannot destroy other bequests, either to such legatee or other persons.⁵ It is

Destruction or alteration by others of no effect.

if its original provisions can be proved.

¹ Townsend v. Howard, 86 Me. 385; Banks v. Banks, 65 Mo. 432, 434; Bohanon v. Walcott, 1 How. (Miss.) 336, 339; Semmes v. Semmes, 7 Har. & J. 388, 390, distinguishing between the cancellation of a will under the mistaken supposition that the testator had made another valid will, and a deliberate cancellation without mistake or accident, but with the intention of making a new will: Hairston v. Hairston, 30 Miss. 276.

² Post, § 221; Minor v. Guthrie, 4 S. W. R. (Ky.) 179; Minkler v. Minkler, 14 Vt. 125, 127; Beaumont v. Keim, 50 Mo. 28, 29; Appling v. Eades, 1 Gratt. 286; Holland v. Ferris, 2 Bradf. 334; Weeks v. McBeth, 14 Ala. 474; Dawson v. Smith, 3 Houst. 335, 341; Legare v. Ashe, 1 Bay, 464; Clark's Will, Tuck. 445, 452; Bap-

tist Church v. Robbarts, 2 Pa. St. 110; Foster's Appeal, 87 Pa. St. 67, 75; Scoggins v. Turner, 98 N. C. 135; Hamersley v. Lockman, 2 Dem. 524, 533; Jaques v. Horton, 76 Ala. 238, 245; Bauskett v. Keitt, 22 S. C. 187; Collyer v. Collyer, 110 N. Y. 481.

³ Snider v. Brooks, 84 Ala. 53, 58. See also *supra*, p. * 89, note 7, as to the destruction of duplicates.

⁴ 1 Jarm. on Wills, *130, citing Haines v. Haines, 2 Vern. 441; the destruction in this case consisted in tearing the will into small pieces, which were picked up and sewed together again.

⁵ "The object is to carry the will into effect, and not merely to attend to the merits or demerits of those who claim under it. If any alteration in a will would avoid it, the executor before pro-

Proof of testator's direction if will is torn or burned, etc., by others. enacted by the statutes of some States, that revocation, where it is done by the burning, tearing, etc., of the will by other persons in the presence of the testator and by his direction, must be proved by at least two witnesses;¹

where there is no statutory provision to such effect, it must clearly appear in evidence that the act of cancellation, if done by a person other than the testator, was in his presence, and by his direction.²

It is not essential, however, that the destruction, obliteration, or cancellation be entire or complete; if it be as complete as was in the

Cancellation sufficient to revoke. power of the testator, it is sufficient to operate as a revocation.³ Where a testator directs the destruction of his will, and delivers it to some person for this purpose, who fraudulently preserves it, the fraud may be * proved by parol; and if the revocation by parol be autho- [* 93] rized by the law, this will constitute a revocation.⁴

§ 49. **Partial Revocation by Cancelling, Obliterating, etc.** — A will may be revoked in part by cancelling or obliterating a portion thereof, leaving the unobliterated portions in force.⁵ Even where a portion of the will is cut out of it, with the intention of annulling such part only, the remainder, if enough is left to constitute an intelligible disposition, is a valid will.⁶ In some States, however, a different rule is established by statute.⁷ Thus it is held in Alabama⁸ that a will cannot be partially revoked, by a can-

bate might, by such alteration, destroy the rights of all third persons, which would be in the highest degree unreasonable": *Smith v. Fenner*, 1 Gall. C. C. 170, 175. See also *Malin v. Malin*, 1 Wend. 625, 659; *Jackson v. Malin*, 15 Johns. 293, 297; *Doane v. Hadlock*, 42 Me. 72, 76. The case *In re Wilson*, 8 Wis. 171, 179, apparently contradicting this doctrine, by avoiding a will *in toto* because it was altered by the legatee, will upon examination be found to rest on agreement of counsel, because this point was not material in their case. Compare the remarks of Cole, J., p. 179, with those of the judge at *nisi prius*, p. 177.

¹ So in Alabama, Arkansas, California, Iowa, and New York.

² *Clingan v. Mitcheltree*, 31 Pa. St. 25, 33. See *Dower v. Seeds*, 28 W. Va. 113, 138.

³ *Sweet v. Sweet*, 1 Redf. 451, 454.

⁴ *Card v. Grinman*, 5 Conn. 164, 168; *Smiley v. Gambill*, 2 Head. 164; *Pryor v. Coggin*, 17 Ga. 444, 448; *White v. Casten*, 1 Jones L. 193; but the statutory provisions must be complied with; it is not

enough that the failure to do so is attributable to the fraud of interested parties: see authorities, *supra*, p. * 89, note 7.

⁵ *Kirkpatrick's Will*, 22 N. J. Eq. 463, 465, citing numerous English authorities; *Cogbill v. Cogbill*, 2 Hen. & Munf. 467, 507; *Bigelow v. Gillott*, 123 Mass. 102, 106; *Townshend v. Howard*, 86 Me. 282, and cases cited; *Varnon v. Varnon*, 67 Mo. App. 534; *McPherson v. Clark*, 3 Bradf. 92, 97, reviewing numerous cases, but overruled in *Lovell v. Quitman*, 88 N. Y. 377, holding that cancellation is not valid unless executed and attested anew; *Boeckes, J.*, dissenting in *Lovell v. Quitman*, 25 Hun. 537, 539; *Chinmark's Estate*, Myr. 128, 129. But it must be a cancellation only; if it works an *alteration* either by an attempted addition or substitution of any other clause the attempted revocation or change is invalid: *Miles' Appeal*, 68 Conn. 237, and cases there cited.

⁶ *Brown's Will*, 1 B. Mon. 56, 57.

⁷ See *infra*, referring to English statute.

⁸ See Code, 1896, § 4265.

cellation of the name of one or more legatees, without codicil, or new signing and attestation.¹ So in New York there can be no partial revocation by cancellation;² nor, it seems, in Ohio.³ Interlineations do not affect the validity of a will, whether they be established by new publication and attestation or not;⁴ but with respect to partial obliterations, if made with the intention of substituting other words for those cancelled, and such intention is frustrated, the same rule holds good that is applied to cancellations with the intention of making a new will.⁵ Such cancellations are held to constitute no revocation.⁶

Interlineations.

Dependent relative cancellation.

The effect of alterations in pencil or ink, respectively, has been mentioned heretofore.⁷

It is obvious, however, that the obliteration, cancellation, or destruction of any essential formal part of a will, without which such will would be inoperative, constitutes a revocation of the

Cancellation of an essential form revokes whole will.

whole will; such act is inconsistent with any other [*94] intention than that of destroying the * validity of the instrument in its entirety.⁸ So the tearing of

a seal from a will, although a seal is not essential to its validity, is deemed a revocation, because the testator, deeming it essential, indicated his intention of destroying the will by tearing off the seal.⁹ And where the signature is cut out of a will *animo revocandi*, pasting it into its former place will not revive the will.¹⁰ But under the Iowa statute, drawing a scroll over the signature so as not to obliterate it nor render it illegible was held not to constitute a revocation, unless the cancellation is witnessed in the same manner as a new will.¹¹

Since all interlineations and additions to a will not contained in it at the time of execution and attestation depend for their validity upon being themselves published and attested,¹² it is important to as-

¹ *Law v. Law*, 83 Ala. 432, holding the declarations of the testator competent to show that he intended the cancellation to revoke the whole will, but inoperative for any purpose if showing an intention to partially revoke.

² *Lovell v. Quitman*, 88 N. Y. 377, 381, overruling *McPherson v. Clark*, 3 Bradf. 92.

³ *Griffin v. Brooks*, 48 Oh. St. 211. See also *Simrell's Estate*, 154 Pa. St. 604.

⁴ *Dixon's Appeal*, 55 Pa. St. 424, 427; *Doane v. Hadlock*, 42 Me. 72, 75; *Wheeler v. Bent*, 7 Pick. 61; *Wells v. Wells*, 4 T. B. Mon. 152, 155.

⁵ See *ante*, § 48.

⁶ *McPherson v. Clark*, 3 Bradf. 92; *Gardiner v. Gardiner*, 65 N. H. 230; *Camp v. Shaw*, 52 Ill. App. 241; *Short v.*

Smith, 4 East, 419; *Jackson v. Holloway*, 7 Johns. 394, 398; *Bethell v. Moore*, 2 Dev. & B. L. 311, 316; *Varnon v. Varnon*, 67 Mo. App. 534.

⁷ § 38, p. *62.

⁸ *Evans's Appeal*, 58 Pa. St. 238, 244; *Semmes v. Semmes*, 7 Har. & J. 388, 390; *Woodfill v. Patton*, 76 Ind. 575, 583; *Succession of Müh*, 35 La. An. 394, 397; *Goods of Morton*, L. R. 12 Prob. D. 141; *Townshend v. Howard*, 86 Me. 285, and cases cited. (In this last-named case the signature was erased with a lead pencil.)

⁹ *Avery v. Pixley*, 4 Mass. 460, 462; and *a fortiori* where a seal is required: *White's Will*, 25 N. J. Eq. 501.

¹⁰ *Bell v. Fothergill*, L. R. 2 P. & D. 148.

¹¹ *Gay v. Gay*, 60 Iowa, 415.

¹² A clause interlined after execution is

Presumptions
as to interlin-
eations and
additions. -

certain whether they were made before or after attestation.¹ The ordinary presumptions in cases of deeds and other instruments are said not to apply to wills.² It is held in Pennsylvania that alterations in the testator's handwriting are presumed to have been made *before* its execution; or, if afterward, and there be codicils, then before the execution of the last codicil;³ and in New Hampshire,⁴ and Illinois⁵ that they have been made *after* execution, but more usually, in respect of instruments generally, courts incline to the view of no presumption, imposing upon the propounder of the instrument the burden of explaining all suspicious alterations.⁶ Where an interlineation in a will is fair upon its face, and it is entirely unexplained, there being no circumstances whatever to cast suspicion upon it, it would not be proper to hold that the alteration was made after execution;⁷ and such interlineations as supply a blank in the sense must be distinguished from those that would indicate a change of intention.⁸

In England, where the statute regulating wills⁹ avoids all erasures and interlineations not specially signed by the testator and attested by the witnesses, the presumption is held to be, independent of the statute, that erasures and interlineations were made after execution, and are therefore void unless proved by some evidence to have been made before.¹⁰

* § 50. **Revocation by Subsequent Will.** — It is usual to [* 95] insert in wills, sometimes even where the testator has made

Revoking will
must be exe-
cuted under
same formal-
ities as will
revoked.

no prior will, a clause revoking all former wills. But whether there be an express revocation or not, it is obvious that a will executed under the formalities prescribed by statute to authorize a valid disposition of the property which it devises or bequeaths must operate to revoke and annul all previous inconsistent testamentary dispositions.¹¹ And it may happen that a will may effectually revoke a prior will, although itself be inoperative as a dispositive instrument; as where

void though made at the testator's request and in his presence and the presence of the witnesses, unless the will is re-attested: *Hesterberg v. Clark*, 166 Ill. 241. See cases *supra* in this section.

¹ *Wilson's Will*, 8 Wis. 171, 180.

² 1 *Redf. on Wills*, 315, pl. 23.

³ *Linnard's Appeal*, 93 Pa. St. 313; *Wikoff's Appeal*, 15 Pa. St. 281.

⁴ *Burnham v. Ayer*, 35 N. H. 351, 354.

⁵ *Camp v. Shaw*, 52 Ill. App. 241.

⁶ *North River Meadow Co. v. Shrewsbury Church*, 22 N. J. L. 424; *Millikin v. Martin*, 66 Ill. 13; *Smith v. United States*, 2 Wall. 219, 222; *Bailey v. Taylor*, 11 Conn. 531, 551. In doubtful cases, where

material alterations or erasures have been made, and the court cannot determine whether they were made before or after execution, the whole instrument should be refused probate: *Matter of Barber*, 92 Hun, 489.

⁷ *Crossman v. Crossman*, 95 N. Y. 145, 153.

⁸ *Voorhees in re*, 6 Dem. 162.

⁹ 1 Vict. c. 126, § 1.

¹⁰ *Cooper v. Bockett*, 10 Jur. 931, 936; *Simmons v. Rudall*, 1 Sim. (n. s.) 115, 136; *Burgoyne v. Showler*, 1 Rob. 5, 13.

¹¹ *Ante*, § 48; *Reese v. Probate Court*, 9 R. I. 434.

a will executed and attested with the necessary formalities to bequeath personal estate, but not to devise realty, revokes a prior will disposing of personal property, and devises real estate; such will is sufficient to revoke the former will, but not sufficient to devise real estate. Or where a testator, having devised property to a person, subsequently devises it to another person who is incapable of taking, the devise in the latter will must fail, but it is sufficient to revoke the former devise.¹ Or a will may be made for the sole purpose of revoking a former will.² It follows from what has been said, that, to constitute a sufficient revoking will, it must be executed and attested with the formalities prescribed by the statute for the testamentary disposition of the class of property disposed of in the former will;³ and an instrument purporting to be a will, containing a revocatory clause, cannot be offered in evidence as a revocation merely, without probate thereof.⁴ Thus a verbal will is insufficient to revoke a written will, unless the statute authorize the disposition of the subject of the written will by parol; and where the statute creates a difference in the execution and attestation between wills of realty and of personalty, a will executed with the necessary formalities for one, but not for the other of these classes, is not sufficient to [* 96] * revoke a will of the other class.⁵ In England and in some of the American States this principle is enacted by statute.⁶

What has been said of wills has self-evidently full application to codicils.⁷ An unexecuted codicil has no more effect to revoke a duly executed will than an unexecuted will could have;⁸ and a properly executed codicil revokes so much of previous wills and no more as is necessarily inconsistent with the dispositions made in the codicil.⁹

¹ *Hairston v. Hairston*, 30 Miss. 276, 302; *Canfield v. Crandall*, 4 Dem. 111.

² 1 Redf. on Wills, 346.

³ *Caeman v. Van Harke*, 33 Kan. 333, 336; *Noyes' Will*, 61 Vt. 14. In North Carolina it was decided that the adoption of an illegitimate child by proceedings under the statute does not itself operate to revoke a former will, nor can the petition in such proceeding be looked upon as a testamentary paper, so as to authorize proof of the intention of the testator to revoke his will: *Davis v. King*, 89 N. C. 441.

⁴ *Stickney v. Hammond*, 138 Mass. 116, 120; *Sewall v. Robbins*, 139 Mass. 164, 167. So where the probate of a will is revoked, declaring it inoperative, such will cannot be relied on as a revocation of a former will, even by heirs who were not parties to the proceedings to set aside

such subsequent will: *Dower v. Seeds*, 28 W. Va. 113, 133.

⁵ *Reid v. Borland*, 14 Mass. 208; *Hollingshead v. Sturgis*, 21 La. An. 450, holding, as many of the cases do, that the act by which a testamentary disposition is revoked must be made in one of the forms prescribed for testaments, and clothed with the same formalities: *Vining v. Hall*, 40 Miss. 83, 107; *Will of Ladd*, 60 Wis. 187; *Barry v. Brown*, 2 Dem. 309.

⁶ 1 Vict. c. 26, § 22.

⁷ See *ante*, § 47.

⁸ *Heise v. Heise*, 31 Pa. St. 246, 249; *Magoohan's Appeal*, 117 Pa. St. 238.

⁹ *Viele v. Keeler*, 129 N. Y. 190; *In re Ladd*, 94 Cal. 670; *Pendergast v. Tibbets*, 164 Mass. 270; *Jones v. Earle*, 1 Gill, 395, 400; *Boyle v. Parker*, 3 Md. Ch. 42, 44; *Reichard's Appeal*, 116 Pa. St. 232; *Stur-*

§ 51. **Effect of Subsequent upon Prior Wills.**—A will or codicil containing a revocatory clause sufficiently attested, together with new testamentary dispositions, revokes the prior will, whether its own dispositions are valid or not;¹ if not sufficiently attested as a revoking will, but valid as to some or all of its testamentary dispositions, it revokes all former dispositions *pro tanto*;² but if its revocatory clause be valid, and all other dispositions invalid, its effect will be to render the testator intestate, as if he had made no will at all.³ But where the principle of dependent relative revocation is applicable;⁴ that is, if the revocation is conditional, dependent upon the efficacy of the attempted new disposition, and that fails, the revocation also fails, leaving the prior will in full force.⁵ But it should be remembered that this principle does not apply where the new devise fails, not from the infirmity of the instrument, but from the incapacity of the devisee;⁶ nor where the testator is aware of the insufficiency of the new disposition.⁷ So, also, where the general rule is recognized that a revocation of a gift based in terms on the existence of conditions which in fact do not exist, will be inoperative to annul such original gift.⁸ This rule is held to be inapplicable where the testator intended to determine for himself the existence or non-existence of the fact on which he bases the revocation.⁹

* The familiar quotation from Swinburne, that no man can [* 97] die with two testaments,¹⁰ is to be understood as applying to

gis v. Work, 122 Ind. 134, 139; Crozier v. Bray, 120 N. Y. 366. See as to the construction of wills and codicils, *post*, § 415, p. * 873, note 5.

¹ Smith v. McChesney, 15 N. J. Eq. 359, 362; *In re* Cunningham, 38 Minn. 169; Burns v. Travis, 117 Ind. 44, 47.

² Boudinot v. Bradford, 2 Dall. 266, 268; Nelson v. McGiffert, 3 Barb. Ch. 158, 164; the specific devise in a codicil revokes a power to sell the same land conferred by the will: Derby v. Derby, 4 R. I. 414, 429.

³ Newton v. Newton, 12 Ir. Ch. 118, 124, 130; Brown v. Brown, 8 El. & Bl. 875, 885. See Biggs v. Angus, 3 Dem. 93.

⁴ *Ante*, § 48.

⁵ "The purpose to revoke being considered to be not a distinct independent intention, but subservient to the purpose of making a new disposition of the property; the testator meaning to do the one so far only as he succeeds in doing the other": 1 Jarm. on Wills, * 169; Barksdale v. Barksdale, 12 Leigh, 535, 540.

⁶ 1 Jarm. on Wills, * 169, citing English cases; also Quinn v. Butler, L. R. 6 Eq. Cas. 225, 227; Goods of Gentry. L. R. 3 P. & D. 80, 83.

⁷ See *ante*, § 48.

⁸ On the ground that the will shows the testator's intention that the revocation is solely conditioned on the existence of the fact as to which the testator is in error. See Giddings v. Giddings, 65 Conn. 149, and English and American authorities referred to in the opinion.

⁹ Giddings v. Giddings, 65 Conn. 149; Hayes v. Hayes, 21 N. J. Eq. 265.

¹⁰ "Concerning the making of a latter testament, so large and ample is the liberty of making testaments, that a man may, as oft as he will, make a new testament even until the last breath; neither is there any cautel under the sun to prevent this liberty: but no man can die with two testaments, and therefore the last and newest is of force: so that if there were a thousand testaments, the last of all is the best of all, and maketh

the conclusiveness of the last testamentary dispositions made by the testator; for "any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate as together containing the last will of the deceased."¹ A subsequent will revokes only so much of a former will as is inconsistent with the last instrument;² if, therefore, the later or latest will dispose of the whole of a testator's estate, all former wills are thereby revoked;³ but if, in the absence of an express revocation, a partial disposition of the estate is thereby made, consistent with the dispositions made in the prior will or wills, or with a portion of them, they may both or all stand as the last will of the testator, to the extent to which the latter do not exclude the former.⁴ Of whatever number of executed documents the will consists, they must all be proved together as constituting one will.⁵ And where a second will appoints a fresh executor, and the wills are not inconsistent, probate may be granted to both executors.⁶ The old English cases are of little value as authority on this point, because the appointment of an executor there constituted a disposition of the whole of the personal property of the testator, the residue going to the executor appointed if not otherwise disposed of; and even under the statutes giving the residue to the next of kin in the absence of its testamentary disposition,⁷ it belongs to the executor when there are no next of kin, and [* 98] the testator makes no disposition of it.⁸ * Every will, therefore, in which an executor was appointed, constituted a complete disposition of the testator's personal property.

The rule, in America at least, is clear, that it is the duty of courts

Last will may be contained in successive instruments, which should all receive probate together.

void the former": Swinb. pt. 7, s. 14, pl. 1.

¹ Wms. Ex. [162].

² Brant v. Willson, 8 Cow. 56; Pickering v. Langdon, 22 Me. 413, 426.

³ Simmons v. Simmons, 26 Barb. 68, 75; *In re Fisher*, 4 Wis. 254, 264; Teacle's Estate, 153 Pa. St. 219.

⁴ Price v. Maxwell, 28 Pa. St. 23, 38; Gordon v. Whitlock, 92 Va. 723; Lemage v. Goodban, L. R. 1 P. & D. 57, 61, in which Sir J. P. Wilde cites *Cutto v. Gilbert*, 9 Moo. P. C. 131, as overruling *Plenty v. West*, 1 Rob. Ecc. 264, and similar cases (holding that the words "last will" in a testamentary paper necessarily import a revocation of previous instruments), and pronouncing for the validity of two wills offered for probate: *Goods of Graham*, 3 Sw. & Tr. 69, 71; *Bartholomew's Appeal*, 75 Pa. St. 169,

173; *Succession of Mercer*, 28 La. An. 564.

⁵ *Pepper's Estate*, 148 Pa. St. 5, and cases cited.

⁶ *Goods of Leese*, 2 Sw. & Tr. 442, 444. When a second will expressly revokes a former will, but refers to and re-enacts certain bequests therein, both wills are entitled to probate, but the person named as executor in the first will is not entitled to letters testamentary: *Nelson's Estate*, 147 Pa. St. 160.

⁷ 11 Geo. IV. and 1 Will. IV. c. 40.

⁸ Wms. Ex. [1477], citing *Taylor v. Haygarth*, 14 Sim. 8, 15 (but in this case the Chancellor directed the residue of personal property to vest in the crown in the absence of next of kin, giving to the executors the proceeds of sale of real estate); *Russell v. Clowes*, 2 Coll. 648, and other authorities.

to give effect to every part of every will of the testator, if the several dispositions can be reconciled; the rule of construction being substantially the same where there are several wills to be harmonized, as where there are several clauses in the same will, or in a will and codicils. Subsequent wills, indeed, perform the office of codicils.¹

It is held that the revocation of a will may be proved by proving the execution of a subsequent will by the testator, which is lost, and has not been, therefore, admitted to probate.² This rule is necessarily confined to cases where the subsequent will either expressly revokes the former, or contains an inconsistent disposition of the whole estate, as by appointment of an executor and residuary legatee;³ and the evidence to establish its execution, as well as its inconsistency with the former will, should be clear and satisfactory, and, particularly if by parol, it must be stringent and conclusive.⁴ There can be no revocation by a later will of which the contents are unknown; the words "this is my last will" are held not to import an inconsistency of disposition between the two instruments.⁵

As an insufficiently attested codicil or later will cannot operate as a revocation of a valid disposition, so a former will or part of a will cannot be deemed revoked by a subsequent bequest so imperfectly worded as not to admit of certainty of its meaning;⁶ but a codicil directing that in a certain contingency the first, otherwise the last, of two prior

* wills should take effect, was held valid, and upon the happening of the contingency the first will and the codicil took effect together.⁷ Where the validity of a later will revoking a former one is denied by the proponent of the first will, on the ground of incapacity in the testator, his declarations that he wished the former will to stand are incompetent.⁸

§ 52. **Revival of a Prior by the Revocation of a Later Will.** — It is a much-disputed question whether the revocation of a revoking

¹ Price v. Maxwell, 28 Pa. St. 23, 38.

² *In re* Cunningham, 38 Minn. 169; see cases *infra*, and see, also, in connection herewith, the discussion on the probate of lost wills, *post*, § 221.

³ Wms. Ex. [161], citing Helyar v. Helyar, 1 Cas. temp. Lee, 472; Jones v. Murphy, 8 Watts & S. 275, 291, 295; Brown v. Brown, 8 El. & Bl. 876, 885; Legare v. Ashe, 1 Bay, 464, 465; Dawson v. Smith, 3 Houst. 335, 337, 339; Caeman v. Van Harke, 33 Kan. 333, 336.

⁴ Cutto v. Gilbert, 9 Moo. P. C. 131, 140; 1 Redf. on Wills, 348, pl. 9, citing Harvard v. Davis, 2 Bin. 406, 417; and

see as to proof of lost wills, *post*, § 221; also Steele v. Price, 5 B. Mon. 58; Kearns v. Kearns, 4 Harr. 83; Southworth v. Adams, 11 Biss. 256, 262.

⁵ Cutto v. Gilbert, *supra*, reversing the doctrine announced in Plenty v. West, 1 Rob. Ecc. 264; Hylton v. Hylton, 1 Gratt. 161, 165; Nelson v. McGiffert, 3 Barb. Ch. 158, 164.

⁶ 1 Redf. on Wills, 356, pl. 23, citing Goblet v. Beechey, 2 Russ. & Myl. 624; Baldwin v. Baldwin, 22 Beav. 413.

⁷ Bradish v. McClellan, 100 Pa. St. 607.

⁸ Wurzell v. Beckman, 52 Mich. 478.

will restored the validity of the will first revoked. It is so asserted upon the ground that wills, being ambulatory in their nature, cannot take effect before the death of the testator, and hence the revocation is itself ambulatory, and may be cancelled before it becomes operative.¹ In the common-law courts of England it was so held as an absolute proposition, excluding all question of intention, that the former will shall revive,² while the ecclesiastical courts inclined to a different doctrine, holding that the presumption is *against* the revival of the prior will, and throwing the onus on the party setting it up to rebut this presumption.³ A third view was finally adopted, according to which it is regarded as a question of intention, to be collected from all the circumstances of the case, unaided and unembarrassed by any legal presumption,⁴ until the question was made the subject of parliamentary action in the new Wills Act,⁵ providing that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by re-execution, or by a codicil executed as required by the act, and showing an intention to revive the same. The language of this statute, says Williams, is not calculated to exclude all controversy on the subject.⁶

[* 100] * The American States are arrayed on different sides of the question. Chancellor Kent does not give a decided opinion;⁷ but Judge Redfield says, "The general rule seems to be firmly established from an early day, that a later will revoked will not prevent an earlier and inconsistent one from remaining in force; and it makes no difference whether the

Revocation of a revoking will

Rules in England.

Rules in America.

¹ 1 Redf. on Wills, 308, pl. 12, citing English cases and *Colvin v. Warford*, 20 Md. 357. See *Peck's Appeal*, 50 Conn. 562, 565, drawing the distinction between the revocatory effect of a will which, being operative as a written declaration, accomplishes the revocation *as such*, at once, and is not itself ambulatory or dependent upon the testator's death for its validity, and one which, to become valid, must itself be a will or codicil, executed with all the formalities required for such instruments.

² *Wms. Ex.* [178], citing *Goodright v. Glazier*, 4 Burr. 2512, *Harwood v. Goodright*, 1 Cowp. 87, 91, and *Moore v. Moore*, 1 Phillim. 406, 419.

³ *Wms. Ex.* [179], citing *Moore v. Moore*, *supra*, and the cases there mentioned.

⁴ *Ib.*, citing *Usticke v. Bawden*, 2 Add. 116; but see *Hooton v. Head*, 3 Phillim. 26, 32; *Moore v. De La Torre*, 1 Phillim.

375; *Wilson v. Wilson*, 3 Phillim. 543, 554.

⁵ 1 Vict. c. 26, § 22.

⁶ 1 *Wms. Ex.* [181]: "Because it was put by Lord Mansfield, in *Goodright v. Glazier*, that the second will is ambulatory till the death of the testator. If he lets it stand till he dies, it is his will; if he does not, it is not his will, and has no effect, no operation; it is no will at all, being cancelled before his death. If, therefore, such cancellation totally prevents its operation, it may be argued that the previous will remains valid, because it has not been in any manner revoked, inasmuch as the subsequent will in its ambulatory state has no effect whatever." See *infra*, p. * 101.

⁷ "If the first will be not actually cancelled, or destroyed, or expressly revoked, on making a second, and the second will be afterward cancelled, the first will is said to be revived": 4 Kent Comm. 531.

later will contained an express clause of revocation or not.”¹ His authorities, however, are all English, except the case of *Colvin v. Warford*, from Maryland.² Decisions to the same effect in other States are not wanting;³ nor such as hold the contrary doctrine.⁴ In Massachusetts it is held, as in England before the Act of 1 Vict. c. 26, that it is a question of intention; and the oral declarations of the testator, after the cancelling of a will, are held admissible to show whether or not he intended to revive an earlier will.⁵ So in Tennessee.⁶

A number of States have incorporated in their statutes the provisions of the English statute expressly providing that no will *revoked by a later will shall be [* 101] revived by the destruction or revocation of the later will alone.⁷ Under these statutes it was held, in England, that there is no way of reviving a will expressly revoked by a later will, but that of *re-execution* (the destruction or revocation of the revoking instrument does not constitute a re-execution, and is therefore insufficient⁸), and in some of the American States, that it may be accomplished by an expressed intention to that effect.⁹ In New

¹ 1 Redf. on Wills, 308, pl. 12. In Michigan the distinction is made that where a subsequent will contains an express revocatory clause the prior will is thereby revoked, although the second will is destroyed or revoked; whereas if the second will is only inconsistent with the first, but not expressly revocatory, its destruction by the testator will revive the first: *Cheever v. North*, 106 Mich. 390, relying on *James v. Marvin*, 3 Conn. 576, and other cases.

² 20 Md. 357.

³ As in Kentucky: *Linginfetter v. Linginfetter*, Hardin, 119; Maryland: *Colvin v. Warford*, *supra*; New Jersey: *Randall v. Beatty*, 31 N. J. Eq. 643, 645; North Carolina: (intimated, but not decided in) *Marsh v. Marsh*, 3 Jones L. 77, 78; Pennsylvania: *Flintham v. Bradford*, 10 Pa. St. 82, 91; *Rudy v. Ulrich*, 69 Pa. St. 177, 182; South Carolina: *Taylor v. Taylor*, 2 Nott & McC. 482.

⁴ Georgia: *Lively v. Harwell*, 29 Ga. 509, 514; *Barksdale v. Hopkins*, 23 Ga. 332, 340; Michigan: *Scott v. Fink*, 45 Mich. 241, 244; *Stevens v. Hope*, 52 Mich. 65, 69; *Cheever v. North*, 106 Mich. 390 (referred to *supra*); Mississippi: *Bohannon v. Walcott*, 1 How. (Miss.) 336, 339; New York: *Biggs v. Angus*, 3 Dem. 93; Texas: *Hawes v. Nicholas*, 72 Tex. 481; Virginia: *Rudisill v. Rodes*, 29 Gratt. 147.

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In Connecticut, the case of *James v. Marvin*, 3 Conn. 576, was in Peck's Appeal, 50 Conn. 562, attributed to the statute authorizing the revocation of a will by a writing not executed with the formalities of a will, and the latter case holds that where the statute requires the revocation (other than by burning, cancelling, tearing, or obliterating) to be by “a later will or codicil,” such later will is necessarily ambulatory, and although it contain a clause expressly revoking former wills, must take effect as a will before the revoking clause can be operative (p. 565). The destruction or revocation of the second will would therefore necessarily revive, or rather leave in force, the first.

⁵ *Pickens v. Davis*, 134 Mass. 252; *Williams v. Williams*, 142 Mass. 515.

⁶ *McClure v. McClure*, 86 Tenn. 173, 180.

⁷ For instance, in Alabama, Arkansas, California, Connecticut, Georgia, Indiana, Kansas, Kentucky, Missouri, Nevada, New York, Ohio, Virginia, and West Virginia. In California the mere execution of a subsequent revocatory will ends the first will, and such will is not revived, by the revocation of the last will: *In re Lones*, 108 Cal. 688.

⁸ *Major v. Williams*, 3 Curt. 432, 434.

⁹ *Beaumont v. Keim*, 50 Mo. 28, 29; *Rudisill v. Rodes*, 29 Gratt. 147, 148;

York a distinction is drawn between an inconsistent codicil, revoking part of the will by implication, and the revocation by will: the cancellation of the inconsistent codicil leaves the will in force, or revives the part revoked by implication, while the destruction of a revoking will is not sufficient to revive the will revoked.¹

A difficulty is sometimes experienced in determining the revocatory effect upon intermediate codicils or wills of a later codicil, republishing a former will. This question is one which must be determined by the intention of the testator, to be gathered from all the circumstances accessible to the judge of probate;² the indulgence in artificial presumptions, such as that, where a testator by a codicil confirms his will, the will together with all previous codicils is taken to be affirmed, as is in some cases asserted,³—or that the omission to mention a particular codicil in a clause of republication, in which prior codicils are mentioned, constitutes a revocation of the codicil omitted, as has been held in others,⁴—seems better calculated to mislead than to assist in arriving at the testator's purpose.⁵

§ 53. **Revocation by Inconsistent Disposition of the Testamentary Gift.**—A will once executed with the formalities requisite [* 102] to give * it validity remains in force until revoked by act of the testator.⁶ The act of revocation, however, may be performed by the testator without his conscious intention to that effect, if he does something from which the law presumes, or infers, the *animus revocandi*. Such acts, constituting an *implied* revocation, may consist of a disposition of property devised or bequeathed in a manner inconsistent with the testamentary disposition. At the common law and under early English statutes the devise of such land only passed under the will as the testator

Conveyance of subject of gift operates revocation although recovered in lifetime of testator.

Simmons v. Simmons, 26 Barb. 68, 76; *In re Lones*, 108 Cal. 688.

¹ *In re Simpson*, 56 How. Pr. 125, 131.

² *Wikoff's Appeal*, 15 Pa. St. 281, approving *Smith v. Cunningham*, 1 Add. 448, 455.

³ *Green v. Tribe*, L. R. 9 Ch. D. 231, 235; *In re De La Saussaye*, L. R. 3 P. & D. 42; see also *Wade v. Nazer*, 1 Rob. Eccl. 627, 632; *Gordon v. Lord Reay*, 5 Sim. 274, 280; *Uppill v. Marshall*, 3 Curt. Eccl. 636, 640.

⁴ *Wikoff's Appeal*, 15 Pa. St. 281, 291; *Neff's Appeal*, 48 Pa. St. 501; see also, *Burton v. Newbery*, L. R. 1 Ch. D. 234, 240; *Farrar v. St. Catharine's College*, L. R. 16 Eq. 19, 23; *In re Reynolds*, L. R. 3 P. & D. 35; *In re Hastings*, 26 L. T. R. (n. s.) 715.

⁵ See, on this subject, *post*, § 56, on the republication of wills.

⁶ *Wms. on Ex.* [187], quoting *Swinburne*, pt. 7, § 15, pl. 2: "All these things concurring, viz., the long time, the increase of the testator's wealth, and the prejudice of such as are to have the administration of the testator's goods, the testament is not presumed to be revoked. And albeit the testament be made in time of sickness, and peril of death, when the testator does not hope for life, and afterward the testator recover health, yet is not the testament revoked by such recovery: or albeit the testator make his testament by reason of some great journey, yet it is not revoked by the return of the testator."

owned at the time of making it,¹ and continued to own until his death; if, therefore, a testator aliened the devised land, although he subsequently acquired a new freehold interest therein, yet the devise was void.² In equity a valid agreement or covenant to convey operates as a revocation of a former devise of the same estate as effectually as an executed conveyance at law.³

But the law has been changed, in this respect, both in England and in nearly all of the American States. The English Statute

Statutory provisions: will operates upon all property in possession at time of testator's death.

of Wills⁴ provides that no conveyance of real estate made after the execution of a will, or other act in relation to such estate, shall prevent the operation of the will upon such portion of the estate as the testator may have power to dispose of at his death,⁵ and provisions to the same effect, or validating the devise of lands

acquired after the will was made, are contained in the statutes of most States, which will be enumerated in connection with the subject of construing wills.⁶

The conveyance of real estate after a devise thereof operates, * both at common law and under the statutes, as a [* 103] revocation of the devise to the extent of the estate con-

Purchase-money of land devised and contracted by

veyed.⁷ Where the estate devised is contracted to be conveyed, and the purchase-money remains unpaid, either wholly or in part, it goes to the personal repre-

¹ Real estate acquired by the testator after making his will goes to the heir: *Coulson v. Holmes*, 5 Sawy. 279, 281; *Jackson v. Potter*, 9 Johns. 312, 314.

² 1 Jarm. on Wills, * 147. See *post*, § 419, on the change produced by statutes in this respect.

³ Although the estate reverts by the same instrument: *Walton v. Walton*, 7 Johns. Ch. 258, 268, citing English authorities.

⁴ 1 Vict. c. 26, § 23.

⁵ 1 Redf. on Wills, 333, pl. 2.

⁶ *Post*, § 419.

⁷ *Webster v. Webster*, 105 Mass. 538, 542; *Hawes v. Humphrey*, 9 Pick. 350, 361 (citing *Toller*, 19; *Clarke v. Berkeley*, 2 Vern. 720; *Coke v. Bullock*, Cro. Jac. 49; 1 Roll. Abr. 616; *Harkness v. Bailey*, Prec. Ch. 514; *Tucker v. Thurstan*, 17 Ves. 131); see also *Terry v. Edminster*, reported in 9 Pick. 355, note, citing *Viner*, Devise, R. 6; *Simmons v. Beazel*, 125 Ind. 362; *Emery v. Union Society*, 79 Me. 334, holding that the proceeds of the sale in such case do not go to the devisee of the land conveyed, but to the residuum, p. 342; *Cozzens v. Jamison*, 12 Mo. App. 452, 457.

But the sworn statement of the person claiming to be the grantee in such conveyance, unsupported by other evidence, is not sufficient to deprive the devisee of his interest, if the deed is lost and has never been recorded: *Napton v. Leaton*, 71 Mo. 358, 364; and where the conveyance, which it is claimed works a revocation, is itself procured by undue influence or fraud, the will remains in force: *Graham v. Burch*, 47 Minn. 171, 174, and cases cited. The conveyance by the testator of land devised in a will also bequeathing personalty does not affect the legacy: *Warren v. Taylor*, 56 Iowa, 182; nor does the conveyance of a part of the land devised affect the validity of the devise of the remainder: *Swails v. Swails*, 98 Ind. 511, 513; *Hoitt v. Hoitt*, 63 N. H. 475, 497. A devise of ground rents is annulled by the payment of the ground rent in one lump sum to testator in his lifetime: *Harshaw v. Harshaw*, 184 Pa. St. 401. "A specific devise of real estate can only be revoked by the destruction of the will or the execution of another, or by alienation of the estate during the testator's life": *Burnham v. Comfort*, 108 N. Y. 535.

sentative, and not to the devisee, because under the doctrine of equitable conversion the purchaser is regarded as a trustee of the purchase-money for the vendor.¹ In this latter respect, however, provision is made in many of the American States that the purchase-money shall go to the devisee; thus, by the statutes of Alabama,² Arkansas,³ California,⁴ Indiana,⁵ Kansas,⁶ Missouri,⁷ Nevada,⁸ New York,⁹ Ohio,¹⁰ and Oregon,¹¹ it is enacted substantially that a contract or bond for the conveyance of real estate previously devised shall not be deemed a revocation of the devise unless such intention shall clearly appear, but such property shall pass to the devisee subject to the right of the purchaser to enforce specific performance of the contract of sale to the same extent as it would be subject to as [* 104] against the heirs; and all purchase-money unpaid at * the time of the testator's death goes to the devisee, and may be recovered by him from the executor if paid to him.

testator to be sold goes to personal representative.

Unless otherwise provided by statute.

A similar provision exists in many States touching charges or encumbrances by the testator upon devised real estate, which are declared not to constitute revocations of the devise, unless it appear from the will or the instrument creating the charge to be so intended;¹² but the consideration of this subject, as well as that of the ademption of legacies in the testator's lifetime, will be more appropriately taken up in connection with the effect of legacies and marshalling of assets.¹³

Where property is held by a trustee, with power in the *cestui que trust* to bequeath the same by will, the bequest of such property is not revoked by the investment of the same in real estate, subsequent to the date of the will, although the testatrix and her legatee, who is also her husband, occupy the same until she dies.

Will of a *cestui que trust* not revoked by act of the trustee.

The surplus remaining after a sale under a mortgage, after the testator's death, usually goes to the devisees,¹⁴ and in the same proportions as the land would have gone.¹⁵

¹ See American cases cited, *post*, § 276; also *Farrar v. Winterton*, 5 Beav. 1, 8; *Moor v. Raisbeck*, 12 Sim. 123, 138; *Gale v. Gale*, 21 Beav. 349, 353; *Donohoe v. Lea*, 1 Swan, 119, 121.

² Code, 1896, § 4254. It is held, under this statute, that not only the unpaid purchase-money, but also the right to vacate a deed obtained by fraud, passes to the devisee: *Powell v. Powell*, 30 Ala. 697, 704.

³ Dig. of St. 1894, § 7397.

⁴ Civ. Code, § 1301.

⁵ Ann. St. 1894, § 2733.

⁶ Gen. St. 1897, ch. 110, § 31.

⁷ Rev. St. 1889, § 8874.

⁸ Gen. St. 1885, §§ 3012, 3013.

⁹ 2 Banks & Bro. (9th ed. 1896), p. 1879, § 47.

¹⁰ Rev. St. 1889, § 5954.

¹¹ Code, 1887, § 3073.

¹² The property in such cases passes to the devisee subject to the encumbrance: so provided in Alabama, Arkansas, California, Indiana, Kansas, Missouri, Nevada, New York, Ohio, and Oregon.

¹³ *Post*, § 450. See also, as to the exoneration of such encumbrances, *post*, §§ 494, 497.

¹⁴ *Post*, § 279.

¹⁵ *Slocum v. Ames*, 19 R. I. 401.

§ 54. **Revocation by Marriage.**—At common law, the marriage of a *feme sole* works the revocation of any will previously made by her, although she survive her husband,¹ and although the husband, at the time of her marriage, agreed that the marriage should not affect the will.² The rule does not necessarily apply to a will made by a *feme sole*, and operating as an appointment under a power to declare uses.³

As early as 1682 the rule of the civil law,⁴ that where a man made his will, and afterward married and had issue, and died * without expressly revoking his will, leav- [* 105] ing issue and wife unprovided for, this should be considered as an implied revocation of his will, was introduced into the courts of England,⁵ and subsequently adopted in the common-law courts.⁶ Marriage alone of a testator, apart from the existence of issue subsequent to the making of the will, was not considered as having the effect of revoking it.⁷ The rule includes not only testators unmarried at the time of making the will; it also applies to the case of one whose wife subsequently dies, but who marries again and has issue of his subsequent marriage.⁸ But it has been held that the birth of a child alone does not revoke a will made after marriage, since a married man must be supposed to contemplate such event; and that the circumstance that the testator left his wife *enceinte* without knowing it, did not impart to the posthumous birth any revoking effect.⁹ But the birth of

¹ The reason of this rule is said to rest on the disability created by the coverture to dispose of the property devised or bequeathed, whereby the ambulatory quality of the will—one of its essential features—is destroyed: *Hodsdon v. Lloyd*, 2 Bro. Ch. R. 534, 544; *Morey v. Sohler*, 63 N. H. 507, 510; it would follow from this view that, if the husband dies before his wife without having exercised his marital rights respecting the property disposed of by the will, its validity is thereby restored: *Morton v. Onion*, 45 Vt. 145, 152. And so where the husband acquires no right over the wife's property by marriage, the rule ceases with its reason: *In re Tuller*, 79 Ill. 99, 101; *Fellows v. Allen*, 60 N. H. 439, 442; *Webb v. Jones*, 36 N. J. Eq. 163; *Noyes v. Southworth*, 55 Mich. 173; *Emery*, Appellant, 81 Me. 275; and see authorities *post*, § 55, p. * 108, note 13.

² *Carey's Estate*, 49 Vt. 236, 244.

³ 1 Jarm. * 122; 1 Wms. [192]; 1 Redf. on Wills, 294 *et seq.*

⁴ 1 Redf. on Wills, 294, citing Just. Inst. lib. 2, cap. 13, § 5.

⁵ *Overbury v. Overbury*, 2 Show. 242.

⁶ 1 Wms. [192]; 1 Jarm. * 123; 1 Redf. on Wills, 293, pl. 2; *Wilcox v. Rootes*, 1 Wash. (Va.) 140; *Brush v. Wilkins*, 4 Johns. Ch. 506, 510; *Bloomer v. Bloomer*, 2 Bradf. 339, 345. See the case of *Johnston v. Johnston*, 1 Phillim. 447, 468, in which Sir John Nicholl reviews the origin of the rule and the history of its adoption in England, reaching the conclusion that subsequent marriage is not an essential ingredient in the circumstances raising the presumption of revocation. And it seems that such was the civil law.

⁷ "On the ground, probably, that the law had made for the wife a provision independently of the act of the husband, by means of dower": 1 Jarm. * 123; *Hulett v. Carey*, 66 Minn. 327, 338.

⁸ 1 Redf. on Wills, 293, pl. 2, citing *Christopher v. Christopher*, Dick. 445, also cited in 4 Burr. 2182; *Baldwin v. Spriggs*, 65 Md. 373, 379.

⁹ 1 Jarm. * 122, citing *Doe v. Barford*, 4 M. & Sel. 10. But the rule of the civil

issue, without subsequent marriage, in conjunction with other alterations in the testator's circumstances, has been held sufficient to establish an implied revocation of the will.¹

It was the source of considerable dissension between the ecclesiastical and common-law courts, whether the presumption of revocation rested upon the implied intention of the testator to meet the duties devolving on him from the new state of circumstances, or upon a rule of law tacitly annexed to the execution of the will, resulting in a revocation upon marriage and birth of issue independently of his intention. The latter view was announced in the case of *Marston v. Roe*,² by all the judges of England (except Lord Denman, who was absent), and Williams says that there seems to be no doubt that the principle of this case would in [* 106] * future be applied for the decision of cases of this description in the ecclesiastical as well as the temporal courts.³

The importance of the distinction arises out of the consequence that in the former case evidence was admissible in support of the will to rebut the presumed intention,⁴ while in the latter it was finally settled that no evidence of the testator's intention that his will should not be revoked was admissible to rebut the presumption of the law.⁵

Marriage and the birth of issue do not at common law produce revocation of a will, if provision be made for the wife and children by the will itself, or, it is conceived, by settlement executed previously to the will. But it follows from the doctrine that revocation is presumed by the law from marriage and the birth of issue, that a provision for wife and children under a settlement executed *after* the will cannot prevent revocation, as it might have done if the question had been one merely of intention.⁶ Nor is provision for the wife alone sufficient, though made before the will; nor, perhaps, a provision for children alone, though made before the will; it seems that the exception is confined to a case where both wife and children are provided for.⁷

But marriage and issue produce no revocation if child be provided for.

law was that the birth of a child, not foreseen by the testator, operated as a revocation of the entire testament: *Bloomer v. Bloomer*, 2 Bradf. 339, 344.

¹ *Delafield v. Parish*, 1 Redf. 1, 106; *Sherry v. Lozier*, 1 Bradf. 437, 453.

² 8 Ad. & El. 14, 54.

³ Wms. Ex. [195], citing *Israell v. Rodon*, 2 Moore P. C. 51, 63, 64; *Walker v. Walker*, 2 Curt. 854; *Matson v. Magrath*, 1 Robert. 680.

⁴ *Brush v. Wilkins*, 4 Johns. Ch. 506, 510, reviewing the English authorities; *Yerby v. Yerby*, 3 Call, 334, 338, *et seq.*;

Havens v. Van Den Burgh, 1 Denio, 27, 32.

⁵ *Marston v. Roe*, 8 Ad. & El. 14; *Sherry v. Lozier*, 1 Bradf. 437, 453; *Baldwin v. Spriggs*, 65 Md. 373; *Nutt v. Norton*, 142 Mass. 242, 245.

⁶ 1 Jarm. *124, citing *Israell v. Rodon*, 2 Moo. P. C. 51, as overruling *Talbot v. Talbot*, 1 Hagg. 705; *Johnson v. Wells*, 2 Hagg. Eccl. 561, 564; *Ex parte Ilchester*, 7 Ves. 348, 365.

⁷ 1 Jarm. *124, citing *Marston v. Roe*, *supra*, and *Kenebel v. Scrafton*, 2 East, 530, 541.

Several *dicta*¹ intimate the opinion that revocation does not take place where the will disposes of less than the whole estate; but it has never been so decided, and, considering that the inquiry is not what the testator intended, but whether the wife and children be in fact provided for, it seems that revocation would in all cases follow where there is no actual provision, although there might be an intended or professed one.²

* A will once revoked by marriage and the birth of issue is [*107] not revived by the death of the child or children in the lifetime of the testator.³

§ 55. **Revocation by Marriage and Birth of Issue under English and American Statutes.**—The question of implied revocation by a

change in the condition or circumstances of the testator is now determined by statute, both in England and in most of the American States. The English statute of 1837 provides, in this respect, "that every will made by a man or woman shall be revoked by his or her marriage," except a will made in exercise of a power of appointment (§ 18). And "that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances" (§ 19). And "no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid" (by marriage), "or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention to revoke the same" (§ 20).

The American statutes vary greatly on this point. In Colorado,⁴ Connecticut,⁵ Georgia,⁶ Illinois,⁷ Kentucky,⁸ North Carolina,⁹

¹ By Lord Mansfield in *Brady v. Cubit*, 1 Doug. 31, 39; Lord Ellenborough, in *Kenebel v. Sraffon*, 2 East, 541; and Tindal, C. J., in *Marston v. Roe*, 8 Ad. & El. 57.

² 1 Jarm. *125. So property acquired after the execution of the will, and which is unaffected thereby, is not a provision for the after-born children, so as to prevent revocation: *Baldwin v. Spriggs*, 65 Md. 373.

⁷ St. & Curt. St. 1896, p. 1433, § 10. In this State it had been held, before the enactment of this statute, that marriage

⁸ St. 1894, § 4832. Although there be an antenuptial contract: *Ransom v. Connelly*, 93 Ky. 63. It was held that the

³ Jarm. *126, relying on *Helyar v. Helyar*, cited in 1 Phillim. 413; *Sullivan v. Sullivan*, cited in 1 Phillim. 343; *Emerson v. Boville*, cited in 1 Phillim. 324.

⁴ Scherrer v. Brown, 21 Colo. 481, affirming *Brown v. Scherrer*, 5 Col. App. 255, where the law is fully discussed.

⁵ Since 1885, the act not being retrospective: *Goodsell's Appeal*, 55 Conn. 171.

⁶ Code, 1895, § 3347. The language

alone revoked the previous will of a testator disposing of the whole of his estate without making provision in contempla-

statute was inapplicable where a will was made simultaneously with the marriage, by a woman, with the consent of the in-

⁹ Code, 1883, § 2177.

[*108] Rhode Island,¹ * Virginia,² and West Virginia,³ Under American statutes. the marriage of a man or woman is declared to revoke a previous will made by him or her; in Alabama,⁴ Arkansas,⁵ California,⁶ Indiana,⁷ Missouri,⁸ Nevada,⁹ New York,¹⁰ Oregon,¹¹ and Pennsylvania,¹² the marriage of a *feme sole* is declared to revoke her previous will; the statute in California and Pennsylvania¹³ also providing that the death of the husband before that of the testatrix shall not have the effect to revive her will. In Ohio,¹⁴ on the contrary, the statute provides that the marriage of a testatrix shall not revoke her will previously made; and in Maine,¹⁵ Wisconsin,¹⁶ Illinois,¹⁷ New Hampshire,¹⁸ New Jersey,¹⁹ and Michi-

is: "In all cases the marriage of a testator, or the birth of a child to him, subsequent to the making of a will, in which no provision is made in contemplation of such an event, shall be a revocation of the will." This is held to mean that the provision is made *by the will*; the provision for the wife or child otherwise than by the will has nothing to do with the question: *Deupree v. Deupree*, 45 Ga. 414, 439. Though the statute uses only the word "testator," it is held to apply as well to a testatrix: *Ellis v. Darden*, 86 Ga. 368.

¹ Gen. L. 1896, p. 666, § 16. The language of the former statute is: "No devise . . . shall be revocable otherwise than by a marriage of the testator subsequent to the date thereof, or," etc. This is held to mean, that the acts and instruments specified shall be competent to revoke a will, not that they shall absolutely have that effect: *Wheeler v. Wheeler*, 1 R. I. 364, 373. Hence marriage constitutes a presumptive revocation only, which may be rebutted by extrinsic evidence: *Miller v. Phillips*, 9 R. I. 141, 144.

² Code, 1887, § 2517.

³ Code, 1891, ch. 77, § 6.

⁴ Code, 1896, § 4249.

⁵ Dig. of St. 1894, § 7395.

⁶ Civ. Code, § 1300.

⁷ Burns' Ann. St. 1894, § 2732.

⁸ Rev. St. 1889, § 8873.

⁹ Gen. St. 1885, § 3010.

¹⁰ The subsequent statute authorizing married women to make wills does not change the rule that the will of a *feme sole* is revoked by her marriage: *Brown v. Clark*, 77 N. Y. 369, 372. The statute uses the words "unmarried women," and is held to apply to widows who remarry: *Matter of Kaufmann*, 131 N. Y. 620; but not to a married woman who subsequently becomes a widow and then remarries: *Matter of McLarney*, 153 N. Y. 416.

¹¹ Code, 1887, § 3072.

¹² *Pepper & Lewis Dig.* 1896, p. 1450, § 50.

¹³ And even if the husband gives his consent prior to the marriage, in writing, to a will excluding him, the will is revoked; while it may operate, as against him, as an ante-nuptial contract, a child born after the marriage, is not concluded: *Craft's Estate*, 164 Pa. St. 520.

¹⁴ Rev. St. 1890, § 5958.

¹⁵ *Emery*, Appellant, 81 Me. 275.

¹⁶ *Ward's Will*, 70 Wis. 251, 257.

¹⁷ *In re Tuller*, 79 Ill. 99.

¹⁸ *Fellows v. Allen*, 60 N. H. 439, 442.

¹⁹ *Webb v. Jones*, 36 N. J. Eq. 163.

tion of the relations arising out of it, because under the law of Illinois husband and wife inherited from each other in default of children: *American Board v. Nelson*, 72 Ill. 564, affirming *Tyler v. Tyler*, 19 Ill. 151, and affirmed in *Duryea*

v. Duryea, 85 Ill. 41, 50. Since the act of 1872, marriage, whether of a man or woman, operates *per se* as a revocation of a prior will: *McAnnulty v. McAnnulty*, 120 Ill. 26.

tended husband, and he released by contract all interest in her estate: *Stewart v. Mulholland*, 88 Ky. 38; but it was subsequently held, that a man's marriage re-

vokes his will, although at the execution of the will he executes an ante-nuptial contract with his wife: *Stewart v. Powell*, 90 Ky. 511.

gan,¹ it is so held on the ground of the removal of the disabilities of married women. In Nevada² and California,³ the marriage of a man revokes a will previously made, if the wife survives him and no provision has been made for her; and in Georgia,⁴ and South Carolina,⁵ if the will contains no provision for the future wife and children, if any.

In quite a number of States, in which the statute prescribes the manner in which a will may be revoked, a saving clause is introduced declaring that the statute shall not be understood as controlling or negating a revocation, implied or presumed, upon the ground of a change in the testator's circumstances; for instance, in Kansas,⁶ Maine,⁷ Massachusetts,⁸ Michigan,⁹ Minnesota,¹⁰ Nebraska,¹¹ New Hampshire,¹² Ohio,¹³ Vermont,¹⁴ and Wisconsin.¹⁵ The statute of North Carolina, on the contrary, provides * that no will shall be revoked by any presumption of an [* 109] intention on the ground of an alteration in circumstances.¹⁶

The natural effect of these saving clauses seems to be, that in the States whose statutes so provide the doctrine of the common law on this subject¹⁷ is affirmatively recognized, and its rules must determine the circumstances under which a revocation is to be presumed.¹⁸

The will of a testator disposing of the whole of his estate, who marries after making it, and dies leaving issue of such marriage unprovided for in the will, and not mentioned therein in such way

¹ Noyes v. Southworth, 55 Mich. 173.

² Gen. St. 1885, § 3009.

³ Civ. Code, § 1299; Corker v. Corker, 87 Cal. 643.

⁴ Code, 1895, § 3347.

⁵ Rev. St. 1893.

⁶ Gen. St. 1897, ch. 110, § 37.

⁷ Rev. St. 1883, p. 608, § 3.

⁸ Pub. St. 1882, p. 748, § 8; under this statute it is held that the will of a *feme sole* is revoked by her subsequent marriage: Swan v. Hammond, 138 Mass. 45.

⁹ An implied revocation of a former will in favor of a wife was held to result from a settlement of all property matters pending a divorce: Lansing v. Haynes, 95 Mich. 16.

¹⁰ Gen. St. 1891, § 5630. Marriage without birth of issue will not in this State revoke his will: Hulett v. Carey, 66 Minn. 328.

¹¹ Cons. St. 1893, § 1191.

¹² Pub. St. 1891, ch. 186, § 15.

¹³ Bates' Ann. St. 1895, § 5953.

¹⁴ St. 1894, § 2354.

¹⁵ In this State the will of a married

woman in favor of her children by a former husband is not revoked by her marriage with a third after the death of the second husband, having no children by her last marriage: Will of Ward, 70 Wis. 251.

¹⁶ Code, 1883, § 2178.

¹⁷ *Ante*, § 54.

¹⁸ Warner v. Beach, 4 Gray, 162, 163; Nutt v. Norton, 142 Mass. 242, 245; Swan v. Hammond, 138 Mass. 45. Says the Supreme Court of Nebraska: "It is for the court to determine from the facts of each particular case whether the testator intended the will to stand notwithstanding the changes in his condition": Baacke v. Baacke, 50 Neb. 18, 23, holding that the will was not revoked by the testator's divorce, and the death of a child leaving descendants. Numerous cases are referred to in the opinion. In New Hampshire it is held that this clause "is to be taken not as a recognition and adoption of the common-law doctrine, but of the English decisions under §§ 5, 6, and 22 of the Statute of Frauds, passed in 1676": Hoitt v. Hoitt, 63 N. H. 475, 495; Morey v. Sohler, 63 N. H. 507, 510.

as to show his intention not to make such provision, is declared to be revoked by the statutes of Alabama,¹ Arkansas,² California,³ Missouri,⁴ New York,⁵ Oregon.⁶ The birth of legitimate issue after making a will, for whom no provision is made, revokes the will without reference to the question of marriage under the statutes of Connecticut,⁷ Delaware,⁸ Georgia,⁹ Indiana,¹⁰ Kansas,¹¹ New Jersey,¹² and Ohio.¹³

[*110] * In Colorado¹⁴ and Illinois¹⁵ the statute declares that if, after making a will, a child or children be born to any testator for whom no provision is made therein, the will shall not, on that account, be revoked; but unless it shall appear from the will that such issue was intentionally disinherited, the devises and legacies by such will given shall be abated in equal proportions to raise a portion for such child or children equal to that which such child or children would have been entitled to if no will had been made.

¹ Code, 1896, § 4249. See *Gay v. Gay*, 84 Ala. 38, as to what constitutes sufficient provision, and what evidence is admissible to show provision for a child, by settlement.

² Dig. of St. 1894, § 7395.

³ Civ. Code, § 1298; *Sanders v. Simcich*, 65 Cal. 50.

⁴ Rev. St. 1889, § 8872.

⁵ 2 Banks & Bro. Rev. St. (9th ed.) p. 1878, § 43. If the wife survive. See *Gall in re*, 5 Dem. 374.

⁶ Code, 1887, § 3071.

⁷ Gen. St. 1888, § 542.

⁸ Rev. Code, 1874, p. 510, § 11.

⁹ Code, 1895, § 3347.

¹⁰ Burns' Ann. St. 1894, § 2730. But if such child dies without issue while the mother is living, the estate passes under the will except the wife's interest therein; and in case of the death of both, the child leaving no issue, the whole estate passes under the will, unless the child leaves a wife, who shall hold such estate to her use so long as she remains unmarried: *Ib.*, § 2561. Whether under this section the will is absolutely revoked by the birth of the child, or is held in abeyance until its death without issue, has not been decided: *Morse v. Morse*, 42 Ind. 365, 370. The common-law rule, that marriage alone does not revoke the previous will of a man is not changed in this State: *Bowers v. Bowers*, 53 Ind. 430, 432. There is in this State no presumption that the testator forgot the descendants of a deceased child which neither in their own nor their

mother's right are mentioned in the will: *Culp v. Culp*, 142 Ind. 159.

¹¹ Gen. St. 1897, ch. 110, § 36.

¹² *Coudert v. Coudert*, 43 N. J. Eq. 407.

¹³ Rev. St. 1890, § 5959. The statute "when the testator had no child at the time of executing such will, and shall afterward have a child," is construed to include a posthumous child: *Evans v. Anderson*, 15 Oh. St. 324, 326. The will is not revived by the death of the child before that of the testator: *Ash v. Ash*, 9 Oh. St. 383, 387. A devise to testator's wife for life and then "to the heirs of her body begotten" is not a provision for an after-born child: *Rhodes v. Weldy*, 46 Oh. St. 234.

¹⁴ Mills' Ann. St. 1891, § 4659.

¹⁵ St. & Curt. St. 1896, ch. 39, ¶ 10; *Ward v. Ward*, 120 Ill. 111. The provision required by the statute need not be definite or certain; as the testator may totally disinherit such after-born child, any provision, no matter how remotely contingent, or insignificant, will prevent the application of the statute: *Osborn v. Jefferson Bank*, 116 Ill. 130. And the intent to disinherit may appear from the whole will, read in the light of the surroundings under which it was written: *Hawke v. R. R.*, 165 Ill. 561. But the intention to disinherit must appear from the face of the will; nor is it sufficient that the will shows that the testator knew that a child was about to be born to him, if nothing more appears: *Lurie v. Rudnitzer*, 166 Ill. 609.

Similar provisions, in effect declaring a revocation *pro tanto* upon the birth of issue after the making of a will containing no provision for such event, giving such after-born children an interest in the estate equal to what would have descended to them in case of intestacy, are contained in the statutes of Alabama,¹ Arkansas,² California,³ Delaware,⁴ Iowa,⁵ Maine,⁶ Massachusetts,⁷ Michigan,⁸ [* 111]

¹ Code, 1896, § 4251.

² Dig. of St. 1894, § 7399. Whether the omission of the child is accidental or intentional: *Branton v. Branton*, 23 Ark. 569, 572.

³ Civ. Code, §§ 1306, 1307. The use of the word "children" in the introductory clause of a will is not indicative of an intention to exclude the children of a deceased daughter not named: *Estate of Utz*, 43 Cal. 200, 203. But the term "children" may, if the intent be apparent, be sufficient to show intentional omission of all descendants: *Rhoton v. Blevin*, 99 Cal. 645. Parol evidence is not admissible to show that a testator intentionally omitted a child; it must appear from the will itself: *Estate of Garraud*, 35 Cal. 336, 339; *In re Stevens*, 85 Cal. 322, 328. And the mere mention in the will of one closely related by blood, or intimately associated in family relations with the omitted heir, is insufficient to show that the omission was intentional: *In re Salmon*, 107 Cal. 614. The issue not named in the will of an intentionally disinherited daughter, who was living at the making of the will, do not acquire any rights by the death of such daughter before the testator: *Barter's Estate*, 86 Cal. 441; the purchaser of realty under a sale by the executor under a power in the will does not take a good title as against pretermitted children: *Smith v. Olmstead*, 88 Cal. 582.—The object of the statute in regard to pretermitted heirs is not to compel the testator to make provision for a child, but solely to protect children against forgetfulness or oversight; and parol evidence is inadmissible to show a mistake of the testatrix in devising lands not owned by her: *Matter of Callaghan*, 119 Cal. 571.

⁴ *Warren v. Morris*, 4 Del. Ch. 289, 306. The testamentary title is not disturbed by this statute, but each devisee and legatee is charged with a proportional contribution to make up an estate for the

post-testamentary child equal to what it would have received if there had been no will: *Ib.*, p. 307.

⁵ Iowa Code, 1897, § 3279. This statute mentions posthumous children only. It is held, however, as a principle of law, that the birth of a child to the testator after making his will and before his death operates as an implied revocation: *McCullum v. McKenzie*, 26 Iowa, 510; *Negus v. Negus*, 46 Iowa, 487; *Alden v. Johnson*, 63 Iowa, 124. But the omission may be shown to be intentional by parol testimony: *Lorieux v. Keller*, 5 Iowa, 196, 203. It is also held in this State that the birth of an illegitimate child recognized by the father has the same effect upon the father's previous will: *Milburn v. Milburn*, 60 Iowa, 411.

⁶ Rev. St. 1883, p. 608, § 9. A devise to the widow during her life and widowhood, "to revert to his heirs upon her death or marriage," is not a provision for a posthumous child under this statute. It will take as if the father had died intestate: *Waterman v. Hawkins*, 63 Me. 156, 160.

⁷ Pub. St. 1882, p. 750, § 22. If it is evident from the will that the child was in the contemplation of the testator, it does not take under this statute: *Prentiss v. Prentiss*, 11 Allen, 47, 49, approving *Wild v. Brewer*, 2 Mass. 570; and the omission may be shown to be intentional by parol testimony: *Buckley v. Gerard*, 123 Mass. 8, 11; *Lorings v. Marsh*, 6 Wall. 337, 347. See *Hurly v. O'Sullivan*, 137 Mass. 86, and *Coulam v. Doull*, 133 U. S. 216.

⁸ How. St. 1882, § 5809. The statute also provides a *pro rata* intestacy when a child or issue of a deceased child is by accident or mistake not provided for; it is held thereunder that giving a mere keepsake in the will to such a person, though by name, is not a provision which avoids the application of the statute: *Stebbins' Estate*, 94 Mich. 304, also hold-

Minnesota,¹ Missouri,² Nebraska,³ Nevada,⁴ New Hampshire,⁵ New Jersey,⁶ New York,⁷ Oregon,⁸ Rhode Island,⁹ South Carolina,¹⁰ Tennessee,¹¹ Texas,¹² Utah,¹³ Virginia,¹⁴ Washington,¹⁵ West Vir-

ing parol evidence competent to show intentional omission; but the naming of the children as a class, with a direction for their support, is sufficient to render the statute inapplicable: *Forbes v. Darling*, 94 Mich. 621.

¹ Gen. St. 1891, §§ 5634-5636.

² Rev. St. 1889, § 8877. The statute of Missouri requires the child to be "named" in the will; hence the declaration that one of his children shall take no part of his estate is sufficient to prevent revocation as to such child: *Block v. Block*, 3 Mo. 594; it is held that whenever the mention of one person, by a natural association of ideas, suggests another, it may reasonably be inferred that the latter was in the mind of the testator and was not forgotten or unintentionally omitted; hence specific bequests by name to the minor children of testator's living daughter is a sufficient reference to the daughter to prevent the operation of the statute as to her: *Woods v. Drake*, 135 Mo. 393; and the mention of a deceased child is sufficient as to the descendants of such child without naming them: *Guitar v. Gordon*, 17 Mo. 408, 411; so the naming of a son-in-law, though not designated as such, is equivalent to the naming of the daughter: *Hockensmith v. Slusher*, 26 Mo. 237, 239; the naming of children as a class includes all who answer the description at the time the will takes effect: *Allen v. Claybrook*, 58 Mo. 124, 132. Parol evidence is inadmissible to rebut the presumption that a child not named was unintentionally omitted: *Thomas v. Block*, 113 Mo. 66. If the child or children, or their descendants, had an equal proportion of the testator's estate bestowed upon them in the testator's lifetime, they take nothing by virtue of this statute: Rev. St. § 8878.

³ Cons. St. 1893, § 1207. The intention to disinherit must appear on the face of the will: *C. B. & Q. R. R. v. Wasserman*, 22 Fed. Rep. 872.

⁴ Including issue of a deceased child: Gen. St. 1885, §§ 3013-3016.

⁵ Gen. St. 1891, ch. 186, §§ 10, 11. It is only where the property not devised or

bequeathed is insufficient to satisfy the share of such child that the statute applies: *McIntyre v. McIntyre*, 64 N. H. 609.

⁶ Gen. St. 1896, p. 3760, § 19. A provision for "children born and to be born" is sufficient to avoid the implied revocation: *Stevens v. Shippen*, 28 N. J. Eq. 487, 535.

⁷ 2 Banks & Bro. Rev. St. p. 1879, § 49 (9th ed. 1896); *Matter of Murphy*, 144 N. Y. 557. A sale by the executor under a power in the will is of no effect as against a child not provided for: *Smith v. Robertson*, 89 N. Y. 555.

⁸ *Northrop v. Marquam*, 16 Oreg. 173, holding that the interest of such pretermitted child is not affected by a sale under a power in the will.

⁹ Gen. L. 1896, p. 666, § 22, — whether the pretermission was intentional or accidental. The provision must be made in the will, otherwise it cannot operate against the child: *Chace v. Chace*, 6 R. I. 407, 411; *Potter v. Brown*, 11 R. I. 232.

¹⁰ Rev. St. 1894, §§ 1996, 1997.

¹¹ Code, 1884, § 3033; *Burns v. Allen*, 93 Tenn. 149, deciding that parol evidence cannot be admitted to show that such omission was intentional.

¹² Rev. Civ. St. 1895, §§ 5343, 5344, — if the will was made while the testator had a child living. It is held in this State that marriage alone of a testator does not revoke his previous will, — birth of issue also is necessary: *Morgan v. Davenport*, 60 Tex. 230.

¹³ The presumption is not conclusive that the testator unintentionally omitted the child; parol evidence is admissible, including declarations by the testator, but the other heirs or devisees are not competent witnesses: *Atwood's Estate*, 14 Utah 1; *Coulam v. Doull*, 133 U. S. 216.

¹⁴ Code, 1887, § 2528.

¹⁵ A gift of one dollar "to each of my heirs at law" is an insufficient provision for children otherwise unnamed: *Boman v. Boman*, 49 Fed. Rep. (Cir. C. App.) 329; s. c. 7 U. S. App. 63; parol evidence cannot be admitted to show that a child

ginia,¹ and Wisconsin.² In many of these States no distinction is drawn as between children born after the making of the will,

After-born,
pretermitted,
and posthumous
children.

and such as have been pretermitted, though in existence when the will was made; nor between children and the issue of deceased children. Nor is any distinction recognized, generally, between children born during the lifetime of the testator and posthumous children; the latter are entitled to the same rights and remedies as the former.³

But in Kentucky the birth of a pretermitted child after the making of the will operates to make the devise and bequests of the will contingent upon the death of such child, unmarried and without issue, before it reaches the age of twenty-one years.⁴ A similar provision exists in Mississippi,⁵ Texas,⁶ Virginia,⁷ and West Virginia.⁸ In Pennsylvania, marriage or birth of issue

* after the making of a will in which no provision is made [* 112] for the children, revokes the will *pro tanto*, and such widow, child, or children (although born after the death of the testator) are entitled to shares and dividends of the estate as if there were no will.⁹ And in Georgia "a will executed under a mistake of fact as to the existence or conduct of the *heirs at law* is inoperative as to such heir," as if the testator had died intestate.¹⁰

The adoption of a child under a statute making such adopted child an heir of the party adopting does not, it seems, operate to revoke a pre-existing will.¹¹

not named or provided for was intentionally omitted: *Bower v. Bower*, 5 Wash. 225; *Hill v. Hill*, 7 Wash. 409 (also holding that the statute applies to community property of testator as well as his separate property).

¹ Code, 1891, ch. 77, §§ 16, 17.

² Ann. St. 1889, §§ 2286-2289; *Moon v. Evans*, 69 Wis. 667.

³ *Hart v. Hart*, 70 Ga. 764; *Northrop v. Marquam*, 16 Ore. 173.

⁴ St. 1894, §§ 4847, 4848.

⁵ Ann. Code, 1892, § 4489.

⁶ Rev. St. 1895, art. 5345.

⁷ Code, 1887, § 2527.

⁸ Code, 1891, ch. 77, § 17.

⁹ *Bright*, *Purd.* Dig. 1883, p. 1712, § 18; and see note *h* for a collection of the rules as to the revocation of wills, by marriage and the birth of children, under the statutes of Pennsylvania, with reference to the adjudications. The appointment of the wife as testamentary guardian will not be revoked by the subsequent birth of a child: *Hollingsworth's Appeal*, 51 Pa. St. 518, 521. The revo-

cation by marriage is absolute, whether provision be made for her or not; but as to children, the revocation depends upon the absence of provision for them: *Edwards's Appeal*, 47 Pa. St. 144, 152. The statute means a physical birth, and not a legislative legitimation, after making the will: *McCulloch's Appeal*, 113 Pa. St. 247, 255. This statute, being for the widow's benefit, does not revoke the provisions of a will as to her, but she may take under the will or the intestate laws, at her election: *Fidelity Trust Co.'s Appeal*, 121 Pa. St. 1. See collection of later cases in *Pepper & Lewis Dig.* 1896, p. 1450, § 50, note.

¹⁰ *Jones v. Grogan*, 98 Ga. 552, 554. It is not incumbent on the heir to show that but for such mistake he would have been a beneficiary: *Mallory v. Young*, 98 Ga. 728.

¹¹ *Davis v. King*, 89 N. C. 441; *King v. Davis*, 91 N. C. 142; *Davis v. Fogle*, 124 Ind. 41. This also seems inferred in *Russell v. Russell*, 84 Ala. 48, 52.

§ 56. **Republication of Wills.**—A will which has become inoperative by reason of revocation, either express or implied, may at any time be restored to its original validity by act of the testator, if competent to make a will; because the republication or revival of a revoked will is precisely equivalent to the making of a new one.¹ “In short,” says Williams, “the will so republished is a new will.”² It follows from this, that the same authority and competency are required, and the same solemnities and formalities must be observed, to make a valid republication, as are necessary to make a new will. Hence a will of personalty, which in the absence of statutory provisions to the contrary may be made by parol act, may also, after being revoked, be revived or republished by parol, or by an unattested codicil or other writing;³ and so as to a will of lands not affected by the Statute of Frauds.⁴ But where the execution of a will [*113] requires attestation *by two, three, or more witnesses, it cannot be revived, after revocation, except by re-execution, or by codicil executed in the presence and under the attestation of the same number of witnesses.⁵

Republication of revoked will.

Requires same competency in testator and same formalities as for making a new will.

A codicil will amount to a republication of the will to which it refers, whether it be attached thereto or not;⁶ but the intention of the codicil must always determine, and if it appear from the face of the codicil that it was not the intention of the testator to republish, the ordinary presumption derived from the existence of the codicil will be counteracted.⁷

Codicil amounts to republication. Unless it appears that such was not testator's intention.

Since, as shown above, the republication of a will is tantamount to the making of that will *de novo*, it brings down the will to the date of its republishing, and makes it speak, as it were, from that time.⁸ But it should be observed that a codicil republishing a former

¹ “From the date of the revocation, the will revoked ceases to be a testamentary disposition of the maker's estate. . . . And if the party who made it desires to make a testamentary disposition of his estate, he must make a new will, in the manner required by the statute. But in doing this, he may use the same form of words without variations or with variations, and the same written or printed document that was used at first”: *Barcker v. Bell*, 46 Ala. 216, 222.

² *Wms.* [216].

³ *Wms.* [205], citing *Wentworth Ex. ch. 1*, p. 60.

⁴ *Wms.* [206], citing *Jackson v. Hurlock*, 1 Amb. 487, 494; *Beckford v. Par-*

necott, Cro. Eliz. 493; see also *Havard v. Davis*, 2 Bin. 406, 425; *Jack v. Shoenberger*, 22 Pa. St. 416, 421.

⁵ *Jackson v. Potter*, 9 Johns. 312, 314; *Love v. Johnston*, 12 Ired. L. 355, 361; *Witter v. Mott*, 2 Conn. 67, 69; *Musser v. Curry*, 3 Wash. C. C. 481.

⁶ *Ante*, § 47; *Van Cortlandt v. Kip*, 1 Hill (N. Y.), 590, 593, with a collection of American authorities, affirmed in *Kip v. Van Cortlandt*, 7 Hill (N. Y.), 346, 349, *et seq.*, reviewing the English authorities, *per the Chancellor*.

⁷ *Wms.* [213]; *Kendall v. Kendall*, 5 Munf. 272, 275; *Wikoff's Appeal*, 15 Pa. St. 281, 291.

⁸ *Wood v. Hammond*, 16 R. I. 98, 112;

Codicil brings will republished to its own date.

will, which had been altered by one or more previous codicils, does not set up the will against the codicil or codicils revoking it in part.¹ There is a difference in this respect in the effect of a codicil upon a will in part revoked or changed by an intervening codicil or codicils, and its effect upon prior inconsistent wills; in the latter case, the republication of the first will by date will establish it as the valid last will, and cancel the intermediate one; in the former case, the first will is established as affected or changed by the subsequent codicils.²

* Another consequence of treating the republication as the [* 114] making of a new will is, that its operation extends to matters which have arisen between its date and its republication.³ Real estate acquired after the date of the will, which under the common-law rule cannot pass under such will, because it can include only such as the testator owned at the time of making the will and continued to own until his death,⁴ will pass to the devisee, if fairly included by the language of the devise, by a republication of the will after the property is acquired.⁵ So the will of a widow made before or during coverture, which is not revived by the husband's death,⁶ may be made valid by republication; and a will executed under undue influence is validated by a codicil republishing and confirming it when the testator is free from such influence.⁷

Hawke v. Enyort, 30 Neb. 149, 160; Murray v. Oliver, 6 Ired. Eq. 55, 56; Miles v. Boyden, 3 Pick. 213, 216; *ante*, § 47.

¹ Wms. [217]. "It is perfectly true," says Lord Alvanley, in *Crosbie v. McDoual*, "that if a man ratifies and confirms his last will, he ratifies and confirms it with every codicil that has been added to it": 4 Ves. 610, 616. But see *Alsop's Appeal*, 9 Pa. St. 374, 381, where it is held that although a will and the codicils form but one *testament*, and speak from the date of the last codicil, yet they constitute different *instruments*, and a bequest of the residue by the will "to the legatees" will be confined to such legatees as are therein named, and to such as are

substituted by codicil for some of them; and that legatees not named in the will, but in the codicils (except those substituted in the codicils for others named in the will), are not entitled to participate in the distribution of the residue.

² *Crosbie v. McDoual*, 4 Ves. 610, 616. See on this subject *ante*, § 52, of the revival of former by revocation of later wills.

³ Wms. [218], citing *Wentw. Ex.* ch. 1, p. 62.

⁴ *Ante*, § 53.

⁵ *Haven v. Foster*, 14 Pick. 534, 540.

⁶ *Ante*, § 54. Also *ante*, § 21, p. *28, note 19.

⁷ *O'Neill v. Farr*, 1 Rich. 80, 89.

[* 115]

*BOOK SECOND.

OF GIFTS EXECUTED IN ANTICIPATION OF IMMEDIATE DEATH.

CHAPTER VII.

DONATIONES MORTIS CAUSA.

§ 57. **Origin and Nature of Gifts Mortis Causa.** — Alienability, being one of the essential qualities of property,¹ includes the right of the owner to control its *post mortem* disposition, even without resort to the solemnity of a last will or testament. As he may freely give his property to whom-ever he pleases, his power in this respect being limited only by the policy of the law in vindicating the rights of the family, or of creditors, etc., so he may annex any condition to his gift which is not contrary to the policy of the law. Thus, he may, in case of anticipation of death from an existing illness or impending peril, transfer his ownership to some other person, on condition that, if death do not ensue as the result of such illness or peril, the gift shall revert to the donor; which transaction is known as *donatio mortis causa*. It is apparent that the disposition of property *causa mortis* is in some respects identical with testamentary disposition, being ambulatory or revocable, conditioned or contingent upon the death of the donor, and liable for his debts;² differing, however, chiefly in this, that under a will the gift is completed through the interposition of an executor or administrator, while the donor *mortis causa*, himself executing the gift by delivery to the donee, is, so to speak, his own executor.³

Right of disposition *mortis causa*.

Like testamentary disposition in being ambulatory, contingent upon death, and liable for donor's debts.

Donor *mortis causa* his own executor.

[* 116] * The legal recognition of the *donatio mortis causa* has, as the name indicates, come down to us from the civil law, de-

¹ *Ante*, § 3.

³ *Bloomer v. Bloomer*, *supra*; *Seybold*

² *Bloomer v. Bloomer*, 2 Bradf. 339, *v. Bank*, 5 No. Dak. 460, 469.

346. See *post*, § 63, as to liability for debts.

Origin in the civil law. fined in Justinian's Institutes as "a donation which is made to meet the case of death, as where anything is given upon condition that, if any fatal accident befall the donor, the person to whom it is given shall have it as his own; but if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given."¹ Its principles were incorporated into the common law and transplanted with it to the American States, of whose legal systems they now form a part, not without having been developed by new and successive applications and fluctuating and inconsistent decisions.²

The donation of property *causa mortis* has never been favored in law. It was carefully guarded under the Roman law, which invalidated every such gift unless proved by five witnesses present at the time, every one of whom was required to be a Roman citizen, of full age, of good character, and not related to either donor or donee.³ Such strictness of proof is not required by the common law; but courts regret that this species of gift has not been swept away by the Statute of Frauds,⁴ and are very cautious to require positive, clear, and satisfactory evidence in establishing it, to guard against fraudulent pretences in claiming the property of deceased persons.⁵ But when found to be made in good faith, they must be upheld;⁶ the donee is not obliged to disprove fraud,⁷ nor to prove that the donor was of sound and disposing mind.⁸

* § 58. **Definitions of the Term.** — The definition given by [* 117] Justinian⁹ is commented upon by Lord Loughborough, who

¹ Hammond's Sanders's Just., transl. of Inst. lib. ii. tit. vii., "De Donationibus." The gift by Telemachus to Piræus is cited by the author as an illustration.

² *Per* Matthews, J., in *Basket v. Has-sell*, 107 U. S. 602, 610.

³ *Per* Lowrie, J., in *Headley v. Kirby*, 18 Pa. St. 326, 328.

⁴ *Per* Walton, J., in *Hatch v. Atkinson*, 56 Me. 324, 326. Says the same judge in *Drew v. Hagerty*, 81 Me. 231, 243, "Gifts *causa mortis* ought not to be encouraged. They are often sustained by fraud and perjury. It was an attempt to sustain such a gift by fraud and perjury that led to the enactment for the prevention of fraud and perjury."

⁵ *Per* Gaston, J., in *Shirley v. White-head*, 1 Ired. Eq. 130. To same effect *Grymes v. Hone*, 49 N. Y. 17, 23; *Gass v. Simpson*, 4 Coldw. 288, 297; *Delmotto v. Taylor*, 1 Redf. 417; *Rockwood v. Wig-*

gin, 16 Gray, 402, 403; *Gano v. Fisk*, 43 Oh. St. 462; and see a collection of authorities on this point in 13 Allen, p. 47, note (*); *Parcher v. Savings Institution* 78 Me. 470, 473; *Citizens Bank v. Mit-chell*, 18 R. I. 739.

⁶ *Dresser v. Dresser*, 46 Me. 48, 67; *Ellis v. Secor*, 31 Mich. 185, 188; *Devol v. Dye*, 123 Ind. 321; *Shackleford v. Brown*, 89 Mo. 546, 552; *Brown v. Brown*, 18 Conn. 410, 414; *Bedell v. Carll*, 33 N. Y. 581, 586.

⁷ *Vandor v. Roach*, 73 Cal. 614; s. c. 15 Pac. R. 354. It is error to instruct the jury that the presumption of law is against a *donatio mortis causa*, or that the fact must be proved beyond suspicion: *Lewis v. Merritt*, 113 N. Y. 386, 390.

⁸ *Vandor v. Roach*, *supra*; *Bedell v. Carll*, 33 N. Y. 581, 586.

⁹ *Ante* § 57.

points out the inadequacy of Swinburne's definition¹ in omitting to emphasize the ambulatory or revocable character of the *donatio causa mortis*.² Numerous definitions are given by various writers and judges.³ A contributor to the American Law Review gives this as the most comprehensive and complete: "It is a gift of personal property made by a person in peril of death and in expectation of an early demise, consummated by a manual delivery of the subject of the gift or of the means of obtaining possession of the same by the donor, or by another person in his presence and by his direction, to the donee, or to a third person for the donee, and acceptance on the part of the donee, followed by the death of the donor before the donee, and defeasible by reclamation, the contingency of survivorship, or delivery from the peril."⁴ It is important to remember that three attributes must concur to give validity to a gift *mortis causa*, viz.: *First*, the gift must be induced by the donor's apprehension of impending death; *Second*, it must be conditioned to take effect only in the event of death happening from the peril or cause producing the apprehension, and be revocable until then; and *Third*, there must be delivery of the thing given. If the transaction lack any one or more of these elements, it cannot be supported as a *donatio mortis causa*.⁵

§ 59. **By Whom, to Whom, and of What a Donatio Mortis Causa may be made.**—Any person possessing the capacity to make a will may give his property *mortis causa*.⁶ Hence a married woman may in this way dispose of her separate property without the consent of her husband⁷ in those

Married women may give and receive *mortis causa*.

States in which she may make a will without [* 118] such * consent; but otherwise where such consent is necessary to her will;⁸ and so she may receive such gift to her separate use,⁹ even from her husband; and the husband from her.¹⁰

A donation *mortis causa* may be made to one in trust for the use

¹ Swinb. pt. 1, § 7, pl. 2.

² Tate v. Hilbert, 2 Ves. 111, 118.

³ Wms. [770]; Lord Cowper in Hedges v. Hedges, Prec. Ch. 269; 2 Kent, 444; Story, Eq. Jur. § 606; Sargent, J., in Cutting v. Gilman, 41 N. H. 147, 150, 151; Woodward, J., in Michener v. Dale, 23 Pa. St. 59, 63; Gibson, C. J., in Nicholas v. Adams, 2 Whart. 17, 22; Hatcher v. Buford, 60 Ark. 169; Leyson v. Davis, 17 Mont. 220, 262, et seq.; 3 Redf. Wills, 322, pl. 1; Ashe, J., in Kiff v. Weaver, 94 N. C. 274, 276; Dickeschied v. Bank, 28 W. Va. 340, 360; Henschel v. Maurer, 34 N. W. R. (Wis.) 926.

⁴ Thomas Frazer Reddy, 21 Am. L. Rev. 734.

⁵ Wms. [771]; Grymes v. Hone, 49

N. Y. 17, 20; Dole v. Lincoln, 31 Me. 422, 428; Smith v. Kittridge, 21 Vt. 238, 245; Grattan v. Appleton, 3 Sto. 755, 763.

⁶ Champney v. Blanchard, 39 N. Y. 111, 113.

⁷ Marshall v. Berry, 13 Allen, 43, 45; and evidence that the husband maltreated her is competent to show a motive and reason for the gift: Conner v. Root, 11 Colo. 183.

⁸ Jones v. Brown, 34 N. H. 439, 446; Whitney v. Wheeler, 116 Mass. 490, 492.

⁹ Meach v. Meach, 24 Vt. 591, 596; Gardner v. Gardner, 22 Wend. 526. A gift *inter vivos* was sustained under these circumstances in Howard v. Meniffee, 5 Ark. 668, 671.

¹⁰ Caldwell v. Renfrew, 33 Vt. 213, 219.

and benefit of another,¹ and its validity is not affected by the fact that the donee takes it upon a trust, the terms and limitations of which are prescribed by the donor, and may vary according to subsequent events.² So it may be conditioned that the donee shall take nothing more from the donor's estate;³ but a gift as a trust fund, to be used in charity at the entire and unlimited discretion of the donee, has been held invalid, as being too vague and uncertain as a trust, and not aided by the statute of 43 Eliz. c. 4, as a charitable use.⁴ So the gift in trust must fail if the persons who are to take, or the proportions to which they are entitled, are not clearly indicated; and the donee in such case does not take for his own benefit.⁵

Real estate is generally held to be incapable of being given *mortis causa*; ⁶ and the reason given, to wit, that it is incapable of manual delivery, was at one time extended to choses in action, so that a promissory note payable to the donor could not be the subject of a gift *mortis causa*, because only the donor himself, or his executor or administrator, could compel its payment.⁷ The ancient rule required an assignment in writing, or something equivalent thereto in the form of writing, and an actual execution of the transfer to give validity to the gift of a chose in action.⁸ But since the equitable doctrine * has prevailed that choses in [* 119] action are assignable by the delivery of the evidence of the grantor's right, a gift *mortis causa* becomes valid by such delivery, and may be enforced like any other assignment in equity.⁹ Hence promissory notes of third parties may be given *mortis causa* whether indorsed by the donor or not;¹⁰ but not the donor's own note payable after his

¹ *Dresser v. Dresser*, 46 Me. 48, 67; *Pierce v. Boston Savings Bank*, 129 Mass. 425; *Estate of Barclay*, 11 Phila. 123, 125; *Emery v. Clough*, 63 N. H. 552, 555; *Southerland v. Southerland*, 5 Bush, 591, 594; *Blount v. Burrow*, 4 Bro. C. C. 72, 75; *Hambrooke v. Simmons*, 4 Russ. C. C. 25; *Borneman v. Siddlinger*, 15 Me. 429; *Devol v. Dye*, 123 Ind. 321.

² *Clough v. Clough*, 117 Mass. 83, 85.

³ If, in such case, the donee violate the condition, she must account for the amount of the donation: *Currie v. Steele*, 2 Sandf. 542, 550.

⁴ *Dole v. Lincoln*, 31 Me. 422, 434.

⁵ *Sheedy v. Roach*, 124 Mass. 472, 477.

⁶ *Meach v. Meach*, 24 Vt. 591.

⁷ *Bradley v. Hunt*, 5 Gill & J. 54, 58; *Headley v. Kirby*, 18 Pa. St. 326; *San-*

born v. Goodhue, 28 N. H. 48, 56 (unless the note had been indorsed by the donor).

⁸ *Per Pryor, J.*, in *Stephenson v. King*, 81 Ky. 425, 432; 2 Kent, 446.

⁹ *Ellis v. Secor*, 31 Mich. 185, 188; *Stephenson v. King*, 81 Ky. 425, 430; *Ashbrook v. Ryon*, 2 Bush, 228; *Turpin v. Thompson*, 2 Metc. (Ky.) 420; *Crook v. Bank*, 83 Wis. 31; *Leyson v. Davis*, 17 Mont. 220, 275, *et seq.*, and cases cited. See *Chase v. Redding*, 13 Gray, 418, 420, where Shaw, C. J., reviews the cases showing the gradual development of the present rule.

¹⁰ *Turpin v. Thompson*, 2 Metc. (Ky.) 420; *Westerlo v. De Witt*, 36 N. Y. 340, 345; *Brown v. Brown*, 18 Conn. 410, 413; *Bates v. Kempton*, 7 Gray, 382, 383.

death to the donee.¹ Checks or drafts of third persons,² certificates of deposit payable to the bearer,³ or payable to order and indorsed by the payee,⁴ or even without indorsement,⁵ bonds,⁶ and notes secured by mortgage on real estate,⁷ are proper subjects of gifts *mortis causa*, and pass by delivery without further writing. So the donor's bank-book, given by delivery *mortis causa*, will pass to the donee the money certified as deposited therein, which he may recover by action in the name of the donor's executor or administrator;⁸ an order for the payment of the money deposited, together with an order on the donor's agent having possession of the bank-book, is not sufficient, if the donee fails to obtain possession of the bank-book.⁹

Checks.
Certificates of deposit.
Bonds.
Mortgages.
Bank-books.

A policy of life insurance may be delivered as a gift *causa mortis*; but the assignment of such a policy without delivery confers no right upon the assignee.¹⁰ Certificates of stock of incorporated companies pass by delivery *mortis causa*, without any writing,¹¹ entitling the donee, as equitable owner, to an action to compel a proper transfer of the legal title to him.¹²

Policy of life insurance.
Certificates of stock.

§ 60. **Apprehension of Death.**—The first requisite to a valid *donatio causa mortis* is, as indicated by the name, that it be made under apprehension of the donor's death from an existing illness or

¹ See authorities on this point cited *post*, § 61, p. * 121.

² *Gibson v. Hibbard*, 13 Mich. 214, 217.

³ *Brooks v. Brooks*, 12 S. C. 422, 460; *Westerlo v. De Witt*, 36 N. Y. 340. It is not clear, in the latter case, whether the certificate of deposit had been indorsed or not.

⁴ *Basket v. Hassell*, 107 U. S. 602, 613, citing and reviewing numerous cases.

⁵ *Conner v. Root*, 11 Colo. 183. "The reason for this holding seems to be, that the certificate, bill, or note is the legal evidence of the deposit or debt, and when the owner parts with the instrument by gift or sale, he parts at least *prima facie* with the debt or deposit:" *per Williams, J.*, in *Walsh's Appeal*, 122 Pa. St. 177, 188. See also *In re Dillon*, L. R. 44 Ch. Div. 76.

⁶ Whether of a stranger or of the donee: *Lee v. Boak*, 11 Gratt. 182, 188; *Wells v. Tucker*, 3 Bin. 366, 370; *Waring v. Edmonds*, 11 Md. 424, 433. But in *Overton v. Sawyer*, 7 Jones L. 6, it is held that a bond or sealed note given by de-

livery merely may be recovered by the personal representative.

⁷ Carrying the mortgage if properly assigned to the donee: *Chase v. Redding*, 13 Gray, 418; or even without assignment: *Borneman v. Sidlinger*, 15 Me. 429, 431; *Drake v. Heiken*, 61 Cal. 346; *Hackney v. Vrooman*, 62 Barb. 650, 668.

⁸ *Pierce v. Boston Bank*, 129 Mass. 425, 430; *Hill v. Stevenson*, 63 Me. 364; *Tillinghast v. Wheaton*, 8 R. I. 536; *Curtis v. Portland Bank*, 77 Me. 151; *Ridden v. Thrall*, 125 N. Y. 572. But the contrary doctrine is held in *Walsh's Appeal*, 122 Pa. St. 177, on the ground that a bank-book delivered but not assigned will not transfer the funds from the donor's control.

⁹ *Conser v. Snowden*, 54 Md. 175, 179.

¹⁰ *Trough's Estate*, 75 Pa. St. 115, 118.

¹¹ *Walsh v. Sexton*, 55 Barb. 251, 256, relying on *Westerlo v. De Witt*, 36 N. Y. 340.

¹² *Grymes v. Hone*, 49 N. Y. 17, 22; *Leyson v. Davis*, 17 Mont. 220, 283, *et seq.* and cases cited.

peril.¹ If a gift is made with the view that it take effect upon the donor's death, but while in ordinary health and not in immediate apprehension of death, it may be a valid gift *inter vivos*, but cannot be *mortis causa*.² So a gift made in expectation of immediate death from consumption cannot be supported as *mortis causa* if the donor, after making the gift, sufficiently recover to attend to his ordinary business, although he subsequently die from the same disease.³ But it is not necessary that there should be an expression of the donor's apprehension of death; if the gift is made during his last illness, or while in danger of death from any other cause, it will be presumed to have been made in apprehension of death.⁴ Nor has the rule applicable to nuncupative wills, according to which the legacy is valid only when made under circumstances rendering it impossible to make a written will, any application to gifts *mortis causa*.⁵

The validity of the gift is not affected by the time intervening between the delivery and the happening of the donor's death; the only condition is that there be no recovery from the illness,⁶ or escape from the peril then impending,⁷ which induced the gift. In some cases arising out of the late civil war it was held that the obligations * assumed by one enlisting as a [* 121] soldier. soldier exposed him to such peril as would, on that ground, support a *donatio mortis causa*; ⁸ in other cases this is held differently.⁹

¹ Knott v. Hogan, 4 Metc. (Ky.) 99; Thompson v. Thompson, 12 Tex. 327, 330; Shirley v. Whitehead, 1 Ired. Eq. 130, 132; Dole v. Lincoln, 31 Me. 422, 429; Ogilvie v. Ogilvie, 1 Bradf. 356, 357; Conser v. Snowden, 54 Md. 175, 185; Parcher v. Savings Institution, 78 Me. 470; Dickeschied v. Bank, 28 W. Va. 340, 367.

² Blanchard v. Sheldon, 43 Vt. 512, citing earlier Vermont cases; Irish v. Nutting, 47 Barb. 370, 384; Zeller v. Jordan, 105 Cal. 143.

³ Weston v. Hight, 17 Me. 287; Robson v. Robson, 3 Del. Ch. 51, 67.

⁴ Delmotte v. Taylor, 1 Redf. 417, 421; First National Bank v. Balcorn, 35 Conn. 351, 358; Merchant v. Merchant, 2 Bradf. 432, 442; Rhodes v. Childs, 64 Pa. St. 18, 23; Meach v. Meach, 24 Vt. 591, 599.

⁵ Nicholas v. Adams, 2 Whart. 17; Ridden v. Thrall, 125 N. Y. 572.

⁶ Grymes v. Hone, 49 N. Y. 17, 21; the donor in this case died five months after the delivery of the gift: Williams v.

Guile, 117 N. Y. 343. If death intervenes from a sudden and unforeseen cause, before such recovery or escape, but while still in apprehension of death therefrom, the gift will be good: Ridden v. Thrall, 55 Hun, 185, 190; says Earl, J., in affirming this case on appeal: "When the gift is made in apprehension of death from some disease from which the donor did not recover, and the apparent immediate cause of death was some other disease with which he was afflicted at the same time, the gift becomes effectual": Ridden v. Thrall, 125 N. Y. 572, 581.

⁷ Dexheimer v. Gautier, 5 Roberts. (N. Y.) 216, 223; Milligan, J., dissenting in Gass v. Simpson, 4 Coldw. 288, 300; Gourley v. Linsenhigler, 51 Pa. St. 345, 350.

⁸ Virgin v. Gaither, 42 Ill. 39, 40; Baker v. Williams, 34 Ind. 547, 549; Barber, J., dissenting in Dexheimer v. Gautier, 5 Roberts. (N. Y.) 216, 223; Gass v. Simpson, 4 Coldw. 288, 298, *et seq.*

⁹ See authorities, p. 120, n. 9

Since the gift *mortis causa* is conditioned to take effect upon the donor's death by the existing disorder or peril, it is obvious that it is revocable, before the happening of that event, at his pleasure;¹ and if it be inferable from the circumstances that an irrevocable gift was intended, it can be sustained only as a gift *inter vivos*.²

Ambulatory
during donor's
life.

§ 61. **Delivery of the Thing Given.**—There can be no valid gift *causa mortis* without actual manual tradition or delivery of the thing given, or some act equivalent thereto.³ Hence the promissory note of the donor made payable to the donee after the donor's death is not a *donatio mortis causa* of the amount promised to be paid; the delivery of the note in such case is only the delivery of a *promise*, not of the *thing* constituting the gift.⁴ So of a certificate of deposit payable to order, and indorsed so as to be payable after the donor's death; it is not good as a *donatio causa mortis* for the want of delivery of the thing given.⁵ That the subject of the intended gift is not within reach authorizes no exception to the rule,⁶ and the statement by the donor to the donee of the place in which the subject of the gift could be found, and that one, present at the time, would give it to the donee, is not sufficient, if the thing is not actually so given before the donor's death.⁷ So de-

No valid gift
without actual
delivery.

No exception
of things not
within reach.

[* 122] livery to an agent, with *instruction to him to deliver the gift to the donee in the event of the donor's death, is not sufficient to support the gift *mortis causa*;⁸ such delivery, with direction to deliver absolutely, although not before the donor's death, will

Delivery to
donor's agent
not good as
mortis causa;
but may be
inter vivos.

¹ Rhodes v. Childs, 64 Pa. St. 18, 23; Wells v. Tucker, 3 Bin. 366, 371; Jones v. Brown, 34 N. H. 439, 446; Doran v. Doran, 99 Cal. 311. Hardwicke, Ch., in Ward v. Turner, 2 Ves. Sen. 431, 433; Parish v. Stone, 14 Pick. 198, 203; Emery v. Clough, 63 N. H. 552, 554.

² Authorities, *supra*; Matthews, J., in Basket v. Hassell, 107 U. S. 602, 614; Wms. Ex. [772]. See *post*, § 62.

³ Authorities, *ante*, §§ 57 *et seq.*, and *post*. Almost every case turning upon this subject contains an announcement of the law to this effect: Zimmerman v. Streeper, 75 Pa. St. 147, 154; Phipps v. Hope, 16 Oh. St. 586, 594.

⁴ Bowers v. Hurd, 10 Mass. 427; Parish v. Stone, 14 Pick. 198, 204; Raymond v. Sellick, 10 Conn. 480, 485; Holley v. Adams, 16 Vt. 206; Craig v. Craig, 3 Barb. Ch. 76, 116; Flint v. Pattee, 33 N. H. 520, 522; Sanborn v. Sanborn, 65 N. H. 172.

⁵ Basket v. Hassell, 107 U. S. 602, 614, citing numerous English and American cases; Harris v. Clark, 3 N. Y. 93, 113, overruling Wright v. Wright, 1 Cow. 598, in which the contrary had been held; Trenholm v. Morgan, 28 S. C. 268; Dunn v. Bank, 109 Mo. 90.

⁶ Case v. Dennison, 9 R. I. 88; Egerton v. Egerton, 17 N. J. Eq. 419, 422.

⁷ McGrath v. Reynolds, 116 Mass. 566, 569; Wilcox v. Matteson, 53 Wis. 23, 26.

⁸ Walter v. Ford, 74 Mo. 195; Smith v. Ferguson, 90 Ind. 229, 233; Newton v. Snider, 44 Ark. 42; Daniel v. Smith, 64 Cal. 346, 350; McCord v. McCord, 77 Mo. 166, 174; Barnes v. People, 25 Ill. App. 136. A delivery to the donor's agent does not complete the gift until there is an actual delivery to the donee; and until such time the agent's authority is revocable, and is revoked by the donor's death: Telford v. Patton, 144 Ill. 611, 623.

constitute a perfect gift *inter vivos*;¹ it has been held that, if more be thus delivered than the agent is directed to deliver, the excess is not a gift, either *inter vivos* or *mortis causa*, and passes to the donor's administrator.² Not only must the delivery be actual and complete, so that the donor has no further control or dominion over the thing given, but the donee must take and retain possession until the donor's death. If the donor again has possession, the gift is nugatory.³

Delivery to a third person with direction to deliver to the donee, absolutely to belong to him if the donor should die without making any change, is sufficient,⁴ although the delivery by the third person be not made until after the donor's death.⁵

The delivery must be as complete and perfect as the nature of the property will admit of. Words alone, no matter how clearly they

may express the donor's intention, are not sufficient.⁶ Thus, the gift of a check to an infant, putting it into his hands, and saying, "I give this to baby for himself," is not valid, if the check is found among the donor's papers after his death.⁷ So the delivery is not sufficient if the donor re-

tains any control or dominion over the subject of the gift,⁸ as where one directs the key of a trunk to be taken from the place where it is kept, goods to be placed in the trunk, and the key to be returned to its

place; this is not a delivery, although the directions of the owner are promptly executed, *and he, in his last sickness, [*123] apprehending death, expresses the desire to make the trunk

and its contents a gift *mortis causa*.⁹ Nor is the delivery sufficient if the donor reserve any interest in the thing given, or in any part thereof;¹⁰ as, for instance, where he stipulates for a redelivery to him.¹¹ But the gift is not avoided by a

¹ Hill v. Stevenson, 63 Me. 364, 367; Minor v. Rogers, 40 Conn. 512, 518; Meriwether v. Morrison, 78 Ky. 572.

² Beals v. Crowley, 59 Cal. 665 (three of the judges dissenting on the ground that the excess may be considered a gift to the agent : p. 668).

³ Dunbar v. Dunbar, 80 Me. 152.

⁴ Dole v. Lincoln, 31 Me. 422, 429; Wells v. Tucker, 3 Bin. 366, 370; Coutant v. Schuyler, 1 Pai. 316, 318; Borneman v. Sidlinger, 15 Me. 429; Emery v. Clough, 63 N. H. 552, 555; Woodburn v. Woodburn, 123 Ill. 608.

⁵ Sessions v. Moseley, 4 Cush. 87, 91; Jones v. Dyer, 16 Ala. 221, 225; Kilby v. Godwin, 2 Del. Ch. 61, 70. The circumstances should, however, show a full

relinquishment of dominion over the property to the trustee for the purposes of the trust : Telford v. Patton, 144 Ill. 611, 623.

⁶ See authorities, *supra*, as to delivery, and see Yancey v. Field, 85 Va. 756, and cases cited; McMahan v. Bank, 67 Conn. 78.

⁷ Jones v. Lock, L. R. 1 Ch. App. 25, 28.

⁸ McDowell v. Murdock, 1 Nott & McC. 237, 240; Barnum v. Reed, 136 Ill. 388.

⁹ Coleman v. Parker, 114 Mass. 30, 33.

¹⁰ Daniel v. Smith, 75 Cal. 548; Barnum v. Reed, 136 Ill. 388.

¹¹ Redell v. Dobree, 10 Sim. 244, 251; Hawkins v. Blewitt, 2 Esp. 663; Far-

direction that the donee shall provide for the funeral expenses and a monument for the donor out of the sum given.¹

It seems to have been held in an early case that delivery by symbol was sufficient;² but Kent, in his Commentaries,³ calls attention to the circumstance that the symbol in that case was the same as delivery of the article, and that it was the only case in which a symbol is admitted. The current of authority is certainly very strong against the sufficiency of symbolical delivery⁴ unless it be tantamount to actual delivery. Thus, the delivery of the key of a room containing furniture is such a delivery of the furniture as will support a donation of it *mortis causa*,⁵ not because the delivery of the key is a symbolical delivery of the property, but because it is the means of obtaining possession.⁶ Where the subject of the gift is capable of manual tradition, such as coin, bank-notes, bonds, a watch, or the like, the delivery of the key of a trunk, chest, or box containing it is not a valid delivery.⁷ A late case, decided in Kentucky, holds that the arbitrary rule formerly existing, requiring an assignment (of a chose in action) and delivery of the identical thing in order to make valid a gift *mortis causa*, has long since been abandoned; and that, accordingly, the intention to give, with the actual delivery of the written evidence of the right to the thing, although in possession of another, under the belief of the donor that it perfects the gift, constitutes a valid gift *causa mortis*.⁸

No delivery
by symbol

unless it be
tantamount to
actual delivery.

Key to a ware-
house

Key to a trunk
or box.

quharson v. Cave, 2 Coll. 356, 365; Barnes v. People, 25 Ill. App. 136.

¹ Larrabee v. Hascall, 88 Me. 511, 518.

² Jones v. Selby, Prec. Ch. 300, 303.

³ 2 Kent, * 446.

⁴ 2 Kent, * 446; Cutting v. Gilman, 41 N. H. 147, 152; and see Goulding v. Harbury, 85 Me. 227; Keepers v. Fidelity Co., 56 N. J. L. 302, 306, *et seq.*

⁵ Smith v. Smith, Str. 955; Hatch v. Atkinson, 56 Me. 324, 330, Coleman v. Parker, 114 Mass. 30, 33, Jones v. Brown, 34 N. H. 439, 445.

⁶ Ward v. Turner, 2 Ves. Sen. 430, 443; Colman v. Parker, 114 Mass. 30, 33; Miller v. Jeffress, 4 Gratt. 472, 479; Cooper v. Burr, 45 Barb. 9, 34; Debinson v. Emmons, 158 Mass. 592 (key to a trunk, which was under the immediate control of the parties).

⁷ Hatch v. Atkinson, 56 Me. 324, 331; McGrath v. Reynolds, 116 Mass. 566, 568, citing earlier cases; Keepers v. Fidelity Co., 56 N. J. L. 302 (delivery of a key to

a trunk not under the immediate control of the parties). Says Fauntleroy, J., in delivering the opinion of the court in a recent case: "Constructive delivery is always sufficient when actual manual delivery is either impracticable or inconvenient. The contents of a warehouse, trunk, box, or other depository may be sufficiently delivered by delivery of the key of the receptacle." Thomas v. Lewis, 89 Va. 1, 62, citing a number of authorities, in this case also the statute declaring all gifts invalid unless the donee take actual possession, and also declaring that where the donor and donee reside together, possession at the place of residence is insufficient, was held not to apply to gifts *causa mortis*.

⁸ Stephenson v. King, 81 Ky 425, 435, citing and commenting upon numerous cases; see Southerland v. Southerland, 5 Bush, 591, 594; Ellis v. Secor, 31 Mich. 185, 188; Champney v. Blanchard, 39 N. Y. 111, 116; McDowell v. Murdock, 1 Nott & McC. 237, 239. See as to the

* It is not the possession of the donee that is material, but [* 124] the delivery to him by the donor; delivery stands in the

place of nuncupation, and forms part of the gift.¹ Hence proof of previous possession as bailee, or of after-acquired possession as donee, is not sufficient of itself to prove delivery,² and it is a question of fact, in such

case, whether there has been a delivery sufficient to support the gift;³ declarations made by the deceased subsequently to the alleged gift were held competent evidence to prove such delivery, when made to the donee,⁴ but not

when made to a third person.⁵ There is no distinction in this respect between gifts *inter vivos* and *mortis causa*.⁶ The doctrine of the necessity of delivery to a valid donation *causa mortis* is in some instances carried to the extent of denying the possibility of such a

gift where its subject is a debt owing by the donee to the donor, or a thing held by the donee as bailee or trustee of the donor, because a debt or duty cannot be

released by mere parol, without consideration; and where there is nothing to surrender by delivery, there can be no gift *mortis causa*.⁷ But the more prevalent doctrine is, that where the donee is in possession of the subject of the gift, the empty ceremony of giving it up to the donor and redelivering it to the donee is not necessary to give validity to the transaction.⁸ The destruction of a bond by the obligee, accompanied by his declaration that the money is the obligor's, is a good discharge of the debt *mortis causa*.⁹

Whether a valid gift *mortis causa* can be made in writing, or by deed, is not clear on authority. There are some *dicta* on the assignment of choses in action, *ante*, § 59, pp. *118, *119

¹ Miller v. Jeffress, 4 Gratt. 472, 480.

² McCord v. McCord, 77 Mo. 166, 174; Kenney v. Public Administrator, 2 Bradf. 319, 321; Miller v. Jeffress, *supra*; Cutting v. Gilman, 41 N. H. 147, 152.

³ Hunt v. Hunt, 119 Mass. 474, 475.

⁴ Dean v. Dean, 43 Vt. 337, 343.

⁵ Rockwood v. Wiggin, 16 Gray, 402, 403.

⁶ Camp's Appeal, 36 Conn. 88, 93; Irons v. Smallpiece, 2 B. & Ald. 551; Carpenter v. Dodge, 20 Vt. 595; Sessions v. Mosely, 4 Cush. 87; Appeal of Fross, 105 Pa. St. 258, 267; Westerlo v. De Witt, 36 N. Y. 340.

⁷ Miller v. Jeffress, 4 Gratt. 472, 480; French v. Raymond, 39 Vt. 623, 626. See also Drew v. Hagerty, 81 Me. 231, 242, in which it is held that in order to constitute a valid gift *mortis causa* of a bank-book, there must be an actual de-

livery for the express purpose of consummating the gift; a previous and continuous possession by the donee is insufficient. Says the court in this case, p. 243, "We are aware that some text-writers have assumed, that where the property is already in the possession of the donee, a delivery is not necessary. But the cases cited in support of the doctrine nearly all relate to gifts *inter vivos*, and not to gifts *causa mortis*."

⁸ If there be proof of the relinquishment of all claim to and interest in the subject of the gift: Wing v. Merchant, 57 Me. 383, 386; Tenbrook v. Brown, 17 Ind. 410, 413; Hunt v. Hunt, 119 Mass. 474; Champney v. Blanchard, 39 N. Y. 111, 116; Stevens v. Stevens, 5 Th. & C. 87.

⁹ Gardner v. Gardner, 22 Wend. 526; Darland v. Taylor, 52 Iowa, 503, 506. See also Brinckerhoff v. Lawrence, 2 Sandf. Ch. 400, 410, and authorities cited.

[*125] *subject in English cases;¹ but Williams is of the opinion that, since such instruments are testamentary in their nature and admitted to probate as such, they would not, unaccompanied by delivery, be allowed to operate as donations *mortis causa*.² The same view, and for the same reason, is announced by Ruffin, C. J., in North Carolina;³ and in Massachusetts it is held that gifts *causa mortis* cannot be effected by formal instruments of conveyance or assignment, because symbolical or constructive delivery is not sufficient, actual delivery or its equivalent being required.⁴ If a gift be made by deed, although while under the apprehension of death from existing illness, it may be valid as a gift *inter vivos*, which cannot be revoked and is not avoided by the grantor's recovery from his illness.⁵ In such cases equity will grant relief by setting aside the conveyance upon very slight evidence of mistake, misapprehension, or misunderstanding on the part of the donor.⁶ But there are also cases holding that there may be a valid gift *causa mortis* by deed in writing,⁷ and that in such case actual delivery is not essential.⁸

Gifts causa mortis by deed in writing.

§ 62. **Revocability of Gifts Mortis Causa.** — It has already been stated,⁹ that an essential feature of the gift *mortis causa* is its ambulatory nature before consummation by the donor's death. Not only may the donor, while living, revoke the gift at his pleasure,¹⁰ and give it to another,¹¹ but revocation follows impliedly in several instances without the donor's affirmative action. Thus, the recovery of the donor from the illness or delivery from the peril which induced the gift works its revocation,¹² although

[*126] the *recovery be temporary, and death may finally ensue from the same cause.¹³ The death of the donee occurring before that of the donor likewise operates a revocation, similar in effect to the lapsing of a bequest

Gift revocable by act of the donor;

revoked by recovery of donor;

by death of donee before donor's death;

¹ Lord Hardwicke in *Ward v. Turner*, 2 Ves. Sen. 431, 440; *Johnson v. Smith*, 1 Ves. Sen. 314; Lord Rosslyn in *Tate v. Hilbert*, 2 Ves. Jr. 111, 120.

² *Wms. Ex.* [780], and authorities; *Rigden v. Vallier*, 2 Ves. Sen. 252, 258.

³ *Smith v. Downey*, 3 Ired. Eq. 268, 276.

⁴ *McGrath v. Reynolds*, 116 Mass. 566, 568.

⁵ *Gilligan v. Lord*, 51 Conn. 562, 568; *McCarty v. Kearnan*, 86 Ill. 291.

⁶ *Per* Redfield, C. J., in *Meach v. Mcach*, 24 Vt. 591, 593; *Houghton v. Houghton*, 34 Hun, 212, 214, citing other authorities.

⁷ *Thompson v. Thompson*, 12 Tex.

327; *Kemper v. Kemper*, 1 Duv. 401. In both of these cases, however, there had been actual delivery of the gift.

⁸ *Meach v. Meach*, 24 Vt. 591, 598; *Ellis v. Secor*, 31 Mich. 185, 193.

⁹ *Ante*, § 57.

¹⁰ *Parker v. Marston*, 27 Me. 196, 203; *Wigle v. Wigle*, 6 Watts, 522; *Emery v. Clough*, 63 N. H. 552, 554; *Bunn v. Markham*, 7 Taunt. 224, 231; *Ward v. Turner*, 2 Ves. Sen. 431, 433; *Wells v. Tucker*, 3 Bin. 366, 373; *Parish v. Stone*, 14 Pick. 198, 203.

¹¹ *Parker v. Marston*, *supra*.

¹² *Ante*, § 60.

¹³ See *ante*, § 59.

by the death of the legatee before that of the testator.¹ And it has been held that the *donatio mortis causa* partakes of the nature of legacies to the extent of being revocable by the subsequent birth of issue to the donor.²

A *donatio mortis causa* cannot be revoked by last will or testament, although there be a different testamentary disposition of the specific thing given *mortis causa*, because the will speaks as of the moment of the testator's death, which has vested the previous gift irrevocably in the donee.³ But the gift of a legacy to one who has received a gift *mortis causa* may raise the presumption that the former is a substitution for the latter;⁴ and the donee may sometimes be compelled to choose between them, not being entitled to both.⁵

The gift *causa mortis* is defeasible by reclamation, or any act of the donor inconsistent with the gift and indicating his purpose to resume possession thereof.⁶ Hence the gift is revoked by the demand of the donor for a redelivery, although the donee refuse to surrender it.⁷

§ 63. **Liability of Gifts Mortis Causa to Creditors and Family of the Donor.**—Like gifts *inter vivos* and legacies, gifts *mortis causa* are subject to defeasance in favor of the donor's creditors, because, as against them, one cannot give away his property.⁸ Donees *causa mortis* take their title to the property subject to the contingent right of the administrator to reclaim it, and are bound to have it forthcoming when required for the payment of debts;⁹ or subject to be taken by [* 127] creditors in satisfaction of their claims existing at the time the gift was made;¹⁰ but subsequent creditors have recourse only upon proof of fraudulent intent under existing or anticipated insolvency.¹¹ The donee is not affected

¹ Merchant v. Merchant, 2 Bradf. 432, 444 (mentioning, as the three conditions annexed to the gift under the civil law, either of which would defeat the donation, 1. the recovery of the donor; 2. repentance of the gift; 3. death of the donee before the donor's decease: p. 445); Michener v. Dale, 23 Pa. St. 59, 63; Wells v. Tucker, 3 Bin. 366, 370.

² Bloomer v. Bloomer, 2 Bradf. 339, 348.

³ Merchant v. Merchant, 2 Bradf. 432, 443; Nicholas v. Adams, 2 Whart. 17, 22; Sanborn v. Goodhue, 28 N. H. 48; Emery v. Clough, 63 N. H. 552, 554; Brunson v. Henry, 140 Ind. 455, 464; Hoehn v. Struttman, 71 Mo. App. 399, 406.

⁴ Jones v. Selby, Prec. Ch. 300, 304.

⁵ Johnson v. Smith, 1 Ves. Sen. 314.

⁶ Emery v. Clough, 63 N. H. 552, 554; Marshall v. Berry, 13 Allen, 43, 46.

⁷ Merchant v. Merchant, 2 Bradf. 432, 444.

⁸ Emery v. Clough, 63 N. H. 552, 554.

⁹ Mitchell v. Pease, 7 Cush. 350, 353, citing Toll. 233 (4th ed.); Dunn v. Bank, 109 Mo. 90, 100; Tate v. Hilbert, 2 Ves. Jr. 111, 120; the case of Holland v. Cruft, 20 Pick. 321, 328, announces the Massachusetts law in relation to conveyances *inter vivos* in fraud of creditors.

¹⁰ Chase v. Redding, 13 Gray, 418, 420; Borneman v. Sidlinger, 15 Me. 429, 431; Michener v. Dale, 23 Pa. St. 59, 64.

¹¹ Such is the law as to conveyances *inter vivos*, and there is no distinction in

by the decree of the probate court charging the administrator with the property, and ordering distribution;¹ nor is the gift avoided by the insolvency of the donor's estate further than may be necessary for the payment of debts.² If, therefore, the donee will offer to pay such debts as may be legally established, the administrator cannot maintain an action against him for the restitution of the gift.³

and only to the extent of such debts.

To what extent such gifts will be permitted to interfere with the rights of widows and infant children of the donor, does not appear very clearly. This subject has not received the attention from courts and legislatures which its relation to the obligations arising from marriage and the birth of issue seems to demand. Surrogate Bradford held this

Rights of widow and minor children against donee.

method of disposing of one's property to be testamentary to the extent of bringing it within the operation of the statute of Connecticut declaring a will revoked by the subsequent birth of a child not therein provided for,⁴ because "in the nature and reason of things there seems no substantial ground for not applying the same principle to unwritten as to written legacies." So in Arkansas it was held, on a full discussion of the question and the authorities bearing thereon, that the widow could not be deprived of her statutory dower in the personalty by any gift *causa mortis* made by her deceased husband in his lifetime, independent of any intention of fraud on his part, the principal reason given by the court for its decision being that, so far as the widow's dower rights were concerned, the deceased died "possessed of the property so conveyed."⁵ It has, on the other hand, been expressly held that the right of the widow is to the property of which the husband died seised or possessed; and because gifts *mortis causa* have their full effect in the lifetime of the donor, they do not impair the rights of the widow.⁶ Upon

which Judge Redfield remarks: "It seems to us very questionable, * whether a man of substance can be allowed to

dispose of his whole estate, and leave his widow a beggar, by the means of this species of gift, which is clearly of a testamentary character, where the statute expressly provides that the widow may waive the provisions of the will and come in for her full share of the personal estate, under the statute, by way of distribution.

this respect between such and donations *mortis causa*: *Marshall v. Berry*, 13 Allen, 43, 46. See on this point, and as to the question whether the administrator has power to cause such conveyances to be set aside, or whether the creditors must resort to chancery, *post*, § 296.

¹ *Lewis v. Bolitho*, 6 Gray, 137, 138.

² *Seybold v. Bank*, 5 No. Dak. 460, 469.

³ *Chase v. Redding*, 13 Gray, 418, 422.

⁴ *Bloomer v. Bloomer*, 2 Bradf. 339, 348.

⁵ *Hatcher v. Buford*, 60 Ark. 169, 180.

⁶ *Shaw, C. J.*, in *Chase v. Redding*, 13 Gray, 418; *Cranson v. Cranson*, 4 Mich. 230; *Wells, J.*, in *Marshall v. Berry*, 13 Allen, 43, 46, applying same principle to the wife's gifts without consent of the husband.

No similar statute has ever existed in England in favor of widows, and that question could not therefore arise there. And it is possible the American courts have felt too reluctant to recognize the difference, in this respect, between the widow and next of kin."¹

The question has repeatedly engaged the attention of the Supreme Court of Missouri, and was uniformly decided in the spirit of the illustrious judges above quoted. Judge Norton, delivering the unanimous opinion of the court,² quotes the language of Judge Scott³ as follows: "Although dower is given in personal estate by our statute, yet it was not thereby intended to restrain the husband's absolute control of it during his life, to give and dispose of it as he wills, *provided that it be not done in expectation of death with a view to defeat the widow's dower.* The husband may do as he pleases with his personal property subject to this restriction. After the enjoyment of the property in the most absolute manner during almost his entire life, the law will not permit him, at the approach of death, and with the view to defeat his wife's dower, to give it away. If such a disposition were allowed, the efficacy of the statute conferring dower would depend on the whim or caprice of the husband."⁴ The court held, however, that the widow has no claim against the general estate for the property so disposed of, her relief being in equity to set aside the fraudulent disposition, and to charge the grantee with a trust in her favor.

In Louisiana gifts *causa mortis* cannot exceed a certain proportion of the estate.⁵ In New Hampshire the gift must be proved by the testimony of two indifferent witnesses, upon petition by the donee to the probate court, filed within sixty days after the donor's death.⁶ In Pennsylvania it was held that the mere gift * of [* 129] all the property of one since deceased, to take effect after his death, is not valid as a *donatio causa mortis*, whether accompanied by delivery or not;⁷ not because a man may not so dispose of all his property, but because there is no specific reference to the property, and because the language is testamentary, and the delivery only constructive; it is no objection, therefore, that such a gift comprises the principal part of the donor's estate.⁸

It seems that the principles governing the construction of wills

¹ 3 Redf. on Wills, 323, pl. 3, note 7.

² In *Straat v. O'Neil*, 84 Mo. 68, 71, approved in *Dunn v. Bank*, 109 Mo. 90, 101.

³ In *Stone v. Stone*, 18 Mo. 389.

⁴ "This case" [*Stone v. Stone*, *supra*], says Judge Norton, in *Straat v. O'Neil*, *supra*, "was followed in the cases of *Tucker v. Tucker*, 29 Mo. 350, and *Tucker*

v. Tucker, 32 Mo. 464; and the same doctrine has been announced in the case of *Davis v. Davis*, 5 Mo. 183."

⁵ *Ante*, § 17.

⁶ Pub. St. 1891, p. 523, § 18; *Emery v. Clough*, 63 N. H. 552, 553.

⁷ *Headley v. Kirby*, 18 Pa. St. 326.

⁸ *Michener v. Dale*, 23 Pa. St. 59, 64.

are applicable to gifts *mortis causa*, and that the presumption against fiduciary advisers attending testators is equally valid against a clergyman who receives a gift *mortis causa* while attending the donor *in extremis*.¹

¹ *Per* Sugden, Ch., in *Thompson v. Heffernan*, 4 Dru. & W. 285, 291.

* PART SECOND.

[* 130]

OF THE DEVOLUTION BY OPERATION OF LAW.

CHAPTER VIII.

DESCENT AND DISTRIBUTION OF PROPERTY OF INTESTATES.

§ 64. **Nature and Origin of the Rules of Descent and Distribution.** — In default of the testamentary disposition of the property of a deceased person, the law disposes of the same precisely as the deceased himself would do if acting rationally, and without motive or influence of an extraneous nature. The family of a person have claims upon him while living which are recognized, and to a great extent enforced, by the law: a man may be *compelled* to provide for his wife and children the necessaries for their support and comfort, and for the proper education of his children. But he may freely alien any of his property during his lifetime, even, as has been shown,¹ on the very point of death, or dispose of the same by last will, subject only to such restrictions as the law imposes for the protection of the wife and surviving minor children.²

The family as the basis of devolution. The statutory law of England and America (except in the State of Louisiana) *allows* gifts and devises or bequests, in derogation of the interest of his own family, to a greater extent, perhaps, than any other of the civilized nations; nevertheless, its presumptions and intendments, whenever occasion exists for the application of such, are in favor of the family. Thus it is the family which furnishes the basis and content of the law regulating the devolution of the property of intestates.³

* This subject is so thoroughly treated in the statutes of [* 131] every State of the Union that there is neither room nor occasion

Descent governed by statutes, for an extensive general discussion of its principles apart from a reference to their provisions. But it may be necessary to bear in mind that in most of the States the stat-

¹ *Ante*, § 59.

² *Ante*, §§ 8, 17.

³ "The Statute of Distribution does not break into any settlement made by the father; it only meddles with what was left undisposed of by him, and that

only makes such a will for the intestate as a father, free from the partiality of affections, should himself make; and this I may call a *Parliamentary Will*": Lord Raymond, in *Edwards v. Freeman*, 2 P. Wms. 435, 443.

utes of descent and distribution are subject, and to be construed with reference, to the law concerning dower, tenancy by the curtesy, partnership, homesteads, and exemption, and particularly to the peculiarly American provisions in favor of the widow and minor children for their immediate support, which will be noticed hereafter.¹ It may also serve the purposes of both students and practitioners to notice that, while the American statutes of descent and distribution are exceedingly diverse in their details, they are in the main modelled after and mostly approximate in their general results, the English Statute of Distributions,² which in its turn is mainly borrowed from the civil law,³ so that the construction and practice under it have been governed, to a great extent, by the principles of the civil law.⁴

mostly following English Statute of Descents and Distribution,

which is taken from the civil law.

In connection with the provision of the civil law excluding from the succession an heir, either by testament or to an intestate, who takes or attempts the life of a person to whom he should succeed,⁵ an interesting diversity of opinion has sprung up in the United States, and it was held by the New York Court of Appeals, that the common law, in the absence of a specific enactment, and in disregard of the Statute of Descents, operated a like exclusion in such cases.⁶ This view finds support in the opinions of writers in law publications of the highest standing;⁷ and was followed by the Supreme Court of Nebraska.⁸ But the case of *Riggs v. Palmer* was decided by a divided court,—two of the seven judges dissenting on the ground that the statute prescribes the method by which, and by which only,

Whether the murderer of a testator or ancestor can succeed to the inheritance.

¹ See *post*, §§ 77 *et seq.*; dower, §§ 105 *et seq.*; curtesy, § 121; partnership, §§ 123 *et seq.*; homestead, §§ 94 *et seq.*

² 22 & 23 Car. II. c. 2, § 10. "The provisions of this law stand in striking contrast with the canons of descent of the common law. Primogeniture, the preference of males over females, the blood of the first purchaser, the rule that property never ascends, the exclusion of the half blood,—all these fundamental rules of the common law are violated by the Statute of Distributions. Its great object was equality": Carr, J., in *Davis v. Rowe*, 6 Rand. 355, 361.

³ 2 Kent, 422.

⁴ 3 Redf. on Wills, 422, pl. 3; at least as to the proximity of degrees of kindred; 1 Wms. [419], citing *Mentney v. Petty*, Prec. Ch. 593, and other English cases. It will appear *infra* that the statutes of most States so provide.

⁵ Domat, Civ. L. (translated by Strahan) art. 2551.

⁶ Says Earl, J., speaking for the majority of the court in *Riggs v. Palmer*, 115 N. Y. 506, 511: "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."

⁷ See 30 American Law Review, 130; 4 Harv. Law Review, 394; 8 Ib. 170.

⁸ *Shellenberger v. Ransom*, 31 Neb. 61, 74. This case was an action for the partition of lands conveyed by the father of a tenant in common whom he had murdered for the purpose of possessing himself of her property; the court refused to try the question whether the grantee was an innocent purchaser, on the ground that a father could not succeed to the estate of a daughter whom he had murdered.

a duly executed will can be revoked; that the provisions of the civil law are not applicable as against the positive enactments of the legislature, and that it is not the province of courts to assume the functions of the legislative department of the government.¹ The ruling of the majority was subsequently explained by the court as holding, not that the killing of the testator by the devisee revoked or avoided the will, but that, the devise remaining valid, the court intervened by equitable and injunctive action to prevent the murderer from reaping the fruit of his crime.²

Meanwhile the case of *Shellenberger v. Ransom* was pending on a motion for rehearing, and when it was finally decided, the Supreme Court of Nebraska, in a unanimous, emphatic opinion, reversed its former decision, and sided with the dissenting judges in *Riggs v. Palmer*, holding that the courts cannot annul the positive enactment of the legislature by reading into it the limitations of the civil law, or the promptings of humanity.³ The same principle was announced in Ohio, in the case of *Deem v. Millikin*,⁴ in which Schanck, J., quotes from Judge Redfield:⁵ "It is scarcely necessary, we trust, at this late day, to say that the judicial tribunals of the State have no concern with the policy of legislation," and suggests that even a legislative body, careful to respect both the letter and the spirit of the constitution, might have grave reasons to hesitate to attach to felonies any of the consequences of the corruption of blood. The Supreme Court of Pennsylvania held itself bound, after a careful and exhaustive review of the authorities, by the statutes and constitution of the State, to refuse to make any innovation on the law of descents by decreeing a forfeiture of the inheritance of a parricide, holding that the constitution positively inhibits any attainder of treason or felony by the legislature, or any forfeiture of estate or corruption of blood, except during the life of the offender.⁶ The same conclusion was reached in North Carolina, where it was decided that a widow, guilty of the murder of her husband, was not for that reason debarred of her dower in his estate, because this would be a forfeiture of property for crime, and forfeitures of property are unknown to our law.⁷ There seems to be no escape on principle from the conclusion that at common law, and under the statutes and constitutions of the various States of the Union, courts are not warranted in disregarding the course of descent and distribution, or the conclusiveness of duly executed wills, to divert the succession from the murderers of ancestors or testators, and authori-

¹ *Per* J.J. Gray and Danforth, dissenting, in *Riggs v. Palmer*, 115 N. Y. 506, 515.

³ *Shellenberger v. Ransom*, 41 Neb. 631.

⁴ 6 Ohio Ct. Ct. 357, 360.

² *Ellerson v. Westcott*, 148 N. Y. 149, 154. See remarks on this case *ante*, § 48, p. * 90.

⁵ In the case of *Re Powers*, 25 Vt. 261,

⁶ *Carpenter's Estate*, 170 Pa. St. 203.

⁷ *Owens v. Owens*, 100 N. C. 240.

ties strongly preponderate in this direction.¹ This question has been made the subject of statutory enactment in several States; so, for instance, in Mississippi, where the person causing or procuring the death of another, in any way, cannot inherit from such other, but the inheritance descends as if the person causing or procuring the death had never been in existence;² and in Texas, where the statute provides that no conviction shall work corruption of blood or forfeiture of estate, nor shall there be any forfeiture by reason of death by casualty, and the estate of those who destroy their own lives shall descend or vest as in the case of natural death.³

It is to be borne in mind, that the distribution of personal property of an intestate must be according to the law of the country or State of which he was a domiciled inhabitant at the time of his death,⁴ without regard to the place of either the birth, or death, or the situation of the property at the time; but that real estate descends according to the law of the place where it is situated.⁵ Nor can the descent be governed by a statute not in force on the day of the intestate's death;⁶ and so a vested remainder descends under the law in force at the time of the vesting of the estate in expectancy, not affected by the law governing descents at the termination of the intervening estate.⁷

Personal property descends according to the law of the owner's domicile,

real estate according to the law *rei sitæ*.

Descent is governed by the law in force at the time of intestate's death.

[* 132] * The term "descent" is usually applied to the

devolution of real estate, and "distribution" to that of personal property; and in most States a distinction is still observed in the devolution of these two classes of property, arising, no doubt, out of the former tenure of real estate under the feudal system.⁸

§ 65. **Rights of Children.**—The legitimate result of the ethical union of the sexes is the continuance of the race, which is thus seen to depend for its permanency upon the marriage institution and its

¹ It is noticeable, that in most of the cases so holding the murderers had been convicted and executed. See a discussion of cases in 39 Central L. J. 217 : 32 Ib. 333.

² Ann. Code, Miss. 1892, § 1554.

³ Sayles' St. 1897, art. 1692.

⁴ *Post*, ch. xvii.; also § 565, p. * 1239 and cases there cited.

⁵ *Post*, § 168, and authorities.

⁶ *Savver v. Beal*, 36 Kans. 555, 558.

⁷ *Curtis v. Fowler*, 66 Mich. 696, 698.

⁸ *Ante*, §§ 12–16. Says Scott, J., *In Re Fort's Estate*, 14 Wash. 10, 14, in construing the meaning of "inheritance" as used in a statute: "The old-time refined

or sentimental reason for the distinction drawn between the descent of lands and the descent of personal property does not exist in this country. When the rule originated, real estate did not change hands as frequently as it does at the present day with us, but was usually kept in the same family on the male side from generation to generation. Here land is looked upon more as a commodity and a common subject of bargain and sale. Titles pass frequently, and owners are continually changing." So "descent" was held to include personalty in *Hudnall v. Ham*, 172 Ill. 76.

direct result, the Family. As the instinct of self-preservation is the highest law of all living things, so it is an overruling necessity for the State to vindicate and preserve the Family, whose extinction it could not survive. In recognition of this necessity all States have at all times secured to the several members of a family in the strict sense (father, mother, and minor children) the enjoyment of their common property (by representation through its head); and the civil, canon, and common law, as well as the English and American statutes regulating the descent and distribution of the property of deceased intestates, are unanimous in placing children and the descendants of deceased children of the intestate in the first degree as heirs. The apparent exception to this at common law, and under the statutes of some of the States following it, of a husband taking the personal property of a deceased wife in exclusion of her children, is not an exception in reality; for at common law the personal property of a wife is that of her husband, so that it cannot strictly be said that she died intestate as to such, because she had none to leave. Nor is it, strictly considered, an exception to this rule to allow the husband of a deceased wife to enjoy her lands during his lifetime, or to accord to a widow her dower estate; for in either case the surviving parent is bound, as the head of the remaining family, for the support of the minor children,¹ and the property thus still goes to the benefit of such.

It is not necessary, therefore, to recite the provisions of the statutes of the several States as to their respective shares of inheritance of the real or personal estate of a deceased parent. In all of the States children inherit both real and personal estate in equal shares, the descendants of deceased children taking by representation, or stocks (*per stirpes*), that is, the children of a deceased [* 133] child or descendant taking collectively such share as the deceased child or other descendant would have taken if alive at the time of the intestate's death. Where the share to which the children are entitled is affected by provisions in favor of the father or mother, the modification will be noticed in connection with the rights of such parent.

Adopted children acquire, by the act of adoption in accordance with the statute, if so provided, the same rights as if they were the issue of the adopting parents.²

§ 66. **The Surviving Husband as Heir.**— Upon the death intestate of a married woman, the husband is entitled, at common law and affirmed by the Statute of Frauds,³

¹ Schoul. Dom. Rel. §§ 236, 237.

² As to the consequences of adoption,

see *post*, § 69; Woerner, American Law of Guardianship, §§ 10, 11

³ 29 Car. II. c. 3, § 25.

to all her personal property,¹ whether she left surviving children or descendants or not; and so by the statutes of Delaware,² Georgia,³ Kentucky,⁴ Oregon,⁵ and Pennsylvania.⁶ He is entitled to take as heir, if there be no child nor descendant, nor brother or sister, nor father or mother, nor any next of kin, under the statutes of Alabama,⁷ Arkansas,⁸ Florida,⁹ Louisiana,¹⁰ Maine,¹¹ Maryland,¹² Massachusetts,¹³ Tennessee,¹⁴ Virginia,¹⁵ and West Virginia.¹⁶ Together with children or descendants in California,¹⁷ Colorado,¹⁸ Connecticut,¹⁹ Florida,²⁰

clusion of children at common law and in some States.

In other States, when there are no children, parents, brothers, or sisters, or their descendants.

In others, together with children or descendants.

¹ "If he obtain possession of the wife's personal property without suit, and without taking administration, he is entitled to hold it subject to the claims of her creditors; and, in case another person takes administration, he will hold the property in trust for the husband or her representatives after payment of her debts": Bellows, J., in *Weeks v. Jewett*, 45 N. H. 540, 541, citing numerous English and American cases. See, as to the husband's right to administer, *post*, p. *516, note 10; also p. *642, notes 4 and following.

² Laws, Rev. 1874, p. 548, § 32.

³ Except the separate estate without limitation or remainder over, which can and does take effect if she leave also children or descendants, of which the husband and each child, or the descendants of a deceased child take an equal share, descendants *per stirpes*: Code, 1895, § 3354.

⁴ St. 1894, § 1403, pl. 3.

⁵ Code, 1887, § 3099, pl. 4.

⁶ *Pep. & Lewis Dig.* 1896, p. 2408, § 1, pl. 3. As to the husband's right when the wife dies partially intestate, see *Lee's Appeal*, 124 Pa. St. 74.

⁷ Code, 1886, § 1915. Under the Code of 1896, the husband takes in preference to next of kin, after children, father and mother, and brothers and sisters: § 1453.

⁸ *Dig. of St.* 1894, § 2476.

⁹ If no children, husband takes the whole real and personal estate: *Rev. St.* 1892, § 1820.

¹⁰ Usufruct of the estate until re-marriage: *Voorhies' Rev. C.* art. 915.

¹¹ If issue, one-third; if none, one-half; if no kindred, the whole: *St. (Supplement)* 1895, ch. 75, § 1, pl. 1.

¹² If no descendants or kindred, husband takes the whole estate: *Publ. Gen. L.* 1888, art. 46, pl. 23.

¹³ If no kindred, all her real estate in fee: *Publ. St.* 1882, ch. 124, § 1. If no descendants living, the real estate not exceeding \$5,000 in value in fee, and curtesy in all other real estate: *Ib.*, amended by *St.* 1887, ch. 290. See *Lincoln v. Perry*, 149 Mass. 368, 374.

¹⁴ *St.* 1884, § 3272.

¹⁵ Code, 1887, § 2548, pl. 10.

¹⁶ Code, 1891, ch. 78, § 1, pl. x.

¹⁷ One-half of the real and personal estate, if there be no issue, or one child, or the issue of a deceased child; one-third, if there be more than one child or issue of more, or child and issue of deceased child or children: *Civ. Code*, § 1386. When no issue, father, mother, brother, or sister, the surviving husband takes the whole estate to the exclusion of the descendants of a deceased sister: *In re Ingram*, 78 Cal. 586.

¹⁸ One-half of real and personal estate if there be descendants; all, if no descendants: *Ann. St.* 1891, § 1524. In this State dower and tenancy by curtesy are abolished: *Ib.*

¹⁹ If married prior to April 20, 1877, estate by the curtesy: *Gen. St.* 1874, p. 392, § 28. If married on or after April 20, 1877, or if there be a contract to take under such statute (*Gen. St.* 1887, § 624), usufruct of one-third of real and personal estate during life, or if there be no will, absolutely, and if there be no children, then one-half absolutely: *Gen. St.* 1887, § 623.

²⁰ Child's share, if there be such: *Rev. St.* 1892, § 1820.

* Illinois,¹ Indiana,² Iowa,³ Kansas,⁴ Mississippi,⁵ Nevada,⁶ [* 134] New Hampshire,⁷ North Dakota,⁸ South Carolina,⁹ South Dakota,¹⁰ and Texas.¹¹ In Missouri, the whole estate descends to the husband if the wife leaves no children, or descendants, father, mother, brother, or sister, or descendants of such.¹² If the wife die without leaving issue or descendants, the husband takes the whole estate in Georgia,¹³ Minnesota,¹⁴ Ohio,¹⁵

In the absence
of descendants
the whole estate

¹ One-third of the personalty goes to husband if there is also a child or children or descendants; if no kindred, husband takes all: St. & Cart. St. 1896, ch. 39, ¶ 1. The change from the common-law rule, whereby personal property follows the person of its owner and is distributed pursuant to the law of his domicil, applies only to property in the State of Illinois: *Cooper v. Beers*, 143 Ill. 25, 31.

² One-third of the real estate, subject to wife's debts contracted before the marriage. If she left a will, the husband may elect to take under it: *Burns' Ann. St. 1894*, § 2642. If the wife die intestate, leaving no child, but father or mother or both, three-fourths of the estate, real and personal, goes to the husband; if less than one thousand dollars in value, all: *Ib.*, § 2650. If there are no children, and no father or mother, the whole estate goes to the husband: *Ib.*, § 2657. If husband at the time of his wife's death shall be living in adultery, he takes no part of her estate: *Ib.*, § 2657; *Bradley v. Thixton*, 117 Ind. 255, 257. If husband abandons his wife without just cause and makes no provision for her support, he shall take no part of her estate: *Ib.*, § 2659; *Hinton v. Whittaker*, 101 Ind. 344, 346.

³ One-third in value of legal or equitable real estate; dower and estate in curtesy abolished: *McClain's Ann. Code*, 1888, § 3644. The husband takes one-third absolutely under this section, and the wife cannot deprive him of it by will: *May v. Jones*, 87 Iowa, 188. This section is construed as including personal as well as real property: *Ib.*, p. 194.

⁴ One-half in value of all real estate of which the wife had a legal or equitable interest during the marriage to be set aside by the probate court: *Gen. St. 1889*, § 2611, applicable to husband: § 2619. Estates of dower and curtesy abolished.

⁶ Child's share, if there be descendants,

all, if there be none: *Ann. Code*, 1892, § 1545.

⁶ One-half, if there be also one child or descendants of one; one-third, if there be more than one child, or descendants; one-half if no issue, but a father; all, if no issue and no father, mother, brother, or sister: *Gen. St. 1885*, § 2981.

⁷ In addition to curtesy, one-third of the personalty, if issue surviving, one-half, if none: *Publ. St. 1891*, ch. 195, § 12. On waiving curtesy and homestead, one-third of realty in fee if issue by him surviving; one-third for life, if issue surviving, but not by him; one-half in fee, if no issue: *Ib.*, § 13.

⁸ If one child or descendants of one, one-half; if more than one child, or descendants, one-third; if no issue, but father, one-half; if no issue and no father, but mother, brother, or sister, one-half; if none of these, the whole estate: *Rev. Code*, 1895, § 3742.

⁹ Same share that a widow is entitled to, — i. e., of the real or personal estate, one-third, if there be child or children; one moiety, if there be no lineal descendants but father or mother, and brother or sister of the whole blood; two-thirds if no lineal descendants, father, mother, brother, or sister, nor lineal ancestor: *Rev. St. 1894*, § 1980, pl. 8.

¹⁰ Same as in North Dakota: *Rev. Code*, 1887, § 778.

¹¹ If child or children, or descendants, one-third of personal estate, and a life estate in one-third of the lands; if no child or descendant, all the personalty and one-half of the real estate; if no descendants and no father, mother, brothers, or sisters or their descendants, the whole estate.

¹² *Rev. St. 1889*, § 4465.

¹³ *Code*, 1895, § 3354.

¹⁴ *Rev. St. 1891*, § 5677, changing the prior law.

¹⁵ If no children or their legal represen-

Vermont,¹ and Wisconsin;² one-half of the realty in Michigan;³ and one-half of all the estate in Missouri.⁴ In the absence of any statutory provision, he is entitled by the common law to his estate by the curtesy; in some of the States this is affirmatively announced by statute.⁵

or one-half.

Curtesy.

§ 67. **The Widow as Heiress.**—It is not proposed, in this connection, to treat of the dower and other common-law rights of the widow, nor of the provisions made in the several American States for the immediate support of herself and family upon the death of her husband, all of which will be considered in its proper place;⁶ but only to point out her rights as an heiress of her husband.

At the common law, the widow was originally entitled to her reasonable part of the goods and chattels of her deceased husband, which was one-half if he died without issue surviving, and [* 135] * one-third if he left children or descendants.⁷ Whether this

was really the common law, or the custom of particular places, as has been asserted,⁸ is not now profitable to examine, for the English Statute of Distributions fixes the distributive share to which the widow is entitled by the same rule, and the statutes of most States are so explicit on this point that questions will rarely arise which depend upon this rule of the common law for their solution. But if such question does arise, as it may in cases for which the statute makes no provision, the common law, as modified by English statutes adopted prior to the settlement of the colonies, is presumed to control so far as it is applicable to the condition and policy of American States.⁹

Reasonable part at common law.

The widow is entitled to the whole of her deceased husband's estate, if he died without leaving either descendants or other kin, under the statutes of Alabama,¹⁰ Arkansas,¹¹ Florida,¹² Louisiana,¹³ Maine,¹⁴ Massa-

If husband die without issue or kin, widow inherits the whole estate

tatives living, the whole estate for life: Bates' An. St. 1897, § 4158, pl. 2; if no person entitled to inherit under this section, then the whole estate by inheritance: *Ib.*, § 4160.

¹ All the real estate not exceeding in value \$2,000, and one-half of all in excess of \$2,000, unless he elect to take the tenancy by the curtesy. If the wife leave no kindred capable of inheriting, the husband takes the whole estate: St. 1894, § 2544. Same as to personalty: § 2546.

² Sanb. & B. Ann. St. 1889, § 2270, pl. 2. Same as to personal property: *Ib.*, § 3935.

³ How. Ann. St. (Supplement) 1890, § 5772 *a*, changing prior law.

⁴ Laws, 1895, p. 169, § 4518 *a*. The amended section is entitled "Dower," and is inserted among the provisions for dower.

⁵ *Post*, § 121.

⁶ As to dower, see *post*, §§ 105 *et seq.*; in regard to the support of the family, §§ 77 *et seq.*

⁷ 1 Wms. Ex. (7th Am. ed.) [2].

⁸ Wms. 3.

⁹ *Clark v. Clark*, 17 Nev. 124, 128.

¹⁰ Code, 1886, § 1915, ¶ 5. Under Code, 1896, she takes after parents and brothers and sisters: § 1453.

¹¹ Dig. of St. 1894, § 2476.

¹² Rev. St. 1892, § 1820.

¹³ Voorhies' Rev. Code, art. 915, 917.

¹⁴ Rev. St. 1883, p. 610, § 1.

chusetts,¹ Minnesota,² Mississippi,³ Nebraska,⁴ North Carolina,⁵ Tennessee,⁶ Vermont,⁷ Virginia,⁸ and West Virginia;⁹ and to one-half in Michigan;¹⁰ the widow takes the estate if the husband died without leaving descendant, father, mother, brother, or sister or descendants of in the absence such, in Missouri;¹¹ if he died without leaving lineal descendants in Georgia,¹² Kansas,¹³ and Wisconsin.¹⁴ She together with is entitled to the whole or a proportionate part of the other heirs. estate, according to the existence of descendants or other heirs, in the States of California,¹⁵ Colorado,¹⁶ Connecticut,¹⁷ Delaware,¹⁸ Georgia,¹⁹ Illinois,²⁰ Indiana,²¹ * Idaho,²² Iowa,²³ [* 136]

¹ If no issue, the real estate in fee not exceeding \$5,000 in value, and also one-half of the other real estate for life, or she may elect to take dower in such other real estate; if no kindred, the whole estate: Publ. St. 1882, ch. 124, § 3.

² Gen. St. 1891, § 5677, pl. 2, changing the prior statute.

³ Ann. Code, 1892, § 1545.

⁴ Comp. St. 1881, ch. 23, §§ 30, 176. The act of March 29, 1889, repealing these sections, and incorporated in the statutes of 1893, was held unconstitutional on the ground that it embraced more than one subject: *Trumble v. Trumble*, 37 Neb. 340.

⁵ Code, 1883, § 1281, rule 8.

⁶ St. 1884, § 3272.

⁷ St. 1894, §§ 2544, 2546.

⁸ Code, 1887, § 2548.

⁹ Code, 1891, ch. 78, § 1, pl. x.

¹⁰ St. (Supplement), 1889, § 5772 a, changing the law which prior thereto was the same as in Missouri.

¹¹ Rev. St. 1889, § 4455.

¹² Code, 1882, § 2484.

¹³ Gen. St. 1889, ¶ 2611.

¹⁴ Ann. St. 1889, § 2270, pl. 2.

¹⁵ Civ. Code, § 1386: If one child, or descendants of one, the widow takes one-half of the estate; if more than one, one-third; if no issue, one-half; and if neither issue nor father, mother, brother, or sister, or their issue, the whole estate.

¹⁶ Mills' Ann. St. 1891, § 1524. One-half, if the husband left child or descendants; the whole, if he left no child surviving.

¹⁷ If married prior to April 20, 1877, one-third of the personal estate forever; and if there are no children or representatives of such, one-half of the personal estate forever, and if not otherwise en-

dowed before marriage, one-third of the real estate during her life; if married on or after April 20, 1877, one-third in value of the real and personal property for life, and if there is no will, then one-third absolutely, and if there is no child or representative of such, one-half absolutely: Gen. St. 1887, §§ 623, 626.

¹⁸ If there be child or children, one-third of the personalty, and life estate in one-third of the realty; if no child or children, but other kin, one-half of the personalty, and life estate in one-half of the realty; if no kindred, all the personalty and a life estate in all the realty: Laws, Rev. 1874, p. 548, § 32.

¹⁹ If she renounce dower, the widow is entitled to a child's share in the estate, if the number of shares do not exceed five; if more than five shares, she is entitled to one-fifth of the estate: Code, 1895, § 3354.

²⁰ If no descendant, one-half of the real and all of the personal estate forever; if child or descendant, one-third of the personal estate absolutely; if no kindred, the whole estate: St. & C. St. 1896, ch. 39, ¶ 1, cl. 4, 5.

²¹ One-third of the real estate in fee simple free from demands of creditors, if of less value than \$10,000; one-fourth if exceeding \$10,000 and under \$20,000; one-fifth, if exceeding \$20,000: Ann. St., Rev. 1894, § 2640.

²² If one child or issue of such, or if no child, one-half the estate; if more than one child or issue, one-third; if no issue nor kindred, the whole: Rev. St. 1887, § 5702.

²³ If no issue, one-half; if no issue, and no father or mother, or descendants of such, the estate goes to the wife, or to her heirs if she is dead; and if he had more than one wife, either dead or surviving in lawful wedlock, equally to the one living

Kansas,¹ Kentucky,² Maine,³ Maryland,⁴ Mississippi,⁵ Nebraska,⁶ Nevada,⁷ New Hampshire,⁸ North Dakota,⁹ Ohio,¹⁰ Oregon,¹¹ Pennsylvania,¹² Rhode Island,¹³ South Carolina,¹⁴ South Dakota,¹⁵ Texas,¹⁶

and the heirs of the dead; if all are dead, then the heirs take by right of representation: McClain's Ann. Code, 1888, §§ 3659, 3662. It is held, in this State (by three judges of the Supreme Court, two dissenting), that a husband cannot by a will, made either before or after marriage, deprive his widow of her share in his personal estate: *Ward v. Wolf*, 56 Iowa, 465, affirmed in subsequent cases.

¹ One-half in value of real estate owned by the husband at any time during coverture: Gen. St. 1889, § 2599; not affected by will: *Ib.*, § 2608; if no issue, the whole estate: *Ib.*, § 2611.

² If issue, widow takes one-third; if no issue, one-half of the personal estate after payment of debts: St. 1894, § 1403, pl. 4; not affected by advancements to the heirs: *Ib.*, § 1408; if there is neither paternal nor maternal kindred, the whole real estate goes to the wife: *Ib.*, § 1393, pl. 9.

³ If issue, one-third; if none, one-half; if no kindred, the whole: St. (Supplement), 1895, ch. 75, § 1, pl. 1.

⁴ If no descendant or kindred, the whole estate to the wife; and if she be dead, to her kindred; if the intestate had more wives than one, and all died before him, then to the kindred of both equally: Publ. Gen. L., 1888, art. 46, pl. 23.

⁵ Child's share, where the intestate left a child or children; if he left none, the whole estate goes to the widow in fee simple, after payment of debts: Ann. Code, 1892, § 1545.

⁶ If no issue, the real estate descends to the widow during her life: Cons. St., 1893, § 1123, pl. 30, p. 365, cl. 2. If no issue nor kindred, the whole estate goes to the widow: *Ib.*, cl. 8.

⁷ If one child, or issue of such, one-half; if more than one child or descendant, one-third; if no issue, one-half; if neither issue nor father, mother, brother, or sister, the whole estate to surviving wife: Gen. St. 1885, § 2981.

⁸ In addition to dower and homestead, if she waives provision under the will, one-third of the personal estate, if there is issue living; one-half, if no issue; also, if she waive provision by will, and releasing

her dower and homestead right, one-third of the real estate of which he died seised, if there is issue surviving; one-half, if none: Publ. St. 1891, §§ 10, 11. It was held under the statute previous to the above that the widow was not entitled to take dower and homestead in addition to the estate thus given, but as included therein: *Burt v. Randlett*, 59 N. H. 130. The present statute seems to be framed in accordance with this decision.

⁹ Surviving wife one-half, if there be only one child or issue of such; one-third if more than one child, or issue of such; if no issue, the whole of the estate not exceeding \$5,000, and of the excess one-half; if neither issue nor father, mother, brother, or sister, the whole estate: Rev. Code, 1895, § 3742, pl. 1, 2.

¹⁰ Real estate coming to the intestate by descent, devise, or gift from an ancestor goes to the widow for her natural life, if there are no children or their legal representatives living. Estate that came not by descent, devise, or gift, vests in the widow on the intestate's death: Rev. St. 1890, §§ 4158, 4159.

¹¹ If no issue, wife takes the whole estate; if there be issue, one-half of the personalty: Code, 1887, § 3098.

¹² Bright. Purd. Dig. p. 929, § 2: If there be issue, one-third of the real estate for life, and one-third of the personalty absolutely; if no issue, but other heirs, one-half of the real and personal estate.

¹³ Publ. St. 1882, p. 489, § 9: If no issue, one-half of the personal estate; if there be issue, one-third.

¹⁴ One-third, if there be one or more children; one moiety, if no child; two-thirds, if there be no child, or descendant, father, mother, brother, or sister, nor child of such, nor lineal ancestor: Rev. St. 1893, ch. 77, § 1980.

¹⁵ If the decedent leave only one child or issue of such, one-half; if more than one child, or issue of such, one-third; if no issue, but a father, brother, or sister, the widow takes one-half; if neither issue, nor father, mother, brother, or sister, the whole estate goes to the widow: Comp. L. 1887, § 3381.

¹⁶ If the intestate left a child or descend-

Utah,¹ Vermont,² Virginia,³ Washington,⁴ West Virginia,⁵ Wisconsin,⁶ and Wyoming.⁷ In some of the States these provisions include, or take the place of, dower. Whether the widow is included in a testamentary provision to testator's "heirs," "next of kin," etc., is considered in connection with the rules in expounding wills.⁸

* § 68. **The Father as Heir.**—The degree of propinquity [* 137] between parent and child is obviously the same whether considered in the descending or ascending direction. But the principle determining the devolution of property does not, in this first degree at least, rest upon the ties of consanguinity so much as upon the recognition of the natural dependence of the child upon the parent. So long as the children are minors, this dependence is obvious; and to ignore their claim to share in the distribution of the deceased father's estate would be clearly irrational. And the relation between parent and child, even after the period of minority, is usually such as to plainly indicate the wisdom of the rule which upon the death of the parents secures to the children that estate which they may have assisted in acquiring or increasing, and with which they have become familiar.

These considerations are not so decisive in the case of the death of a child. In the usual course of nature the parent neither expects nor depends upon an accession to his means from such an event. And although the bonds and relations which unite the several members of the family are such as to demand the devolution of the property, which any of them may leave at his death to the others, there

ant, one-third of the personal estate, and an estate for life in one-third of the land; if no child or descendant, all the personal estate, and one-half of the lands; and if neither child nor descendant, nor surviving father nor mother, nor brother nor sister, nor their descendants, the surviving wife shall be entitled to the whole estate: Rev. St. 1895, art. 1688, 1689.

¹ If only one child, or descendants of one, one-half; if more than one child, or descendants, one-third; if no issue, one-half; if no issue, nor father, mother, brother, or sister, the whole: Comp. L. 1888, § 2741, pl. 1, 4.

² If there be no issue, and the widow does not elect to take dower, or waives provision for her by will, she is entitled to the whole estate not exceeding \$2,000, and to one-half the remainder; and if there be no kindred competent to inherit, she takes the whole estate: St. 1894, § 2544.

³ If there is issue by the widow, she is entitled to one-third of the personalty; if no issue, nor issue by a former wife, the

widow is entitled to all the personalty that came to the husband by his marriage with her prior to April 4, 1877, that may remain in kind, and if there be issue by a former marriage, to one-third, and if no issue, to one-half, of the residue; the real estate she, or in case of her death, her heirs, take all, if there be no kindred: Code, 1887, § 2548, pl. 10; § 2557, pl. 3, 4.

⁴ Same as in Utah: Hill's St. & Codes of Washington, 1891, § 1480.

⁵ Same as in Virginia: Code, 1891, ch. 78, pl. 1, subd. x., pl. 9 (excepting as to the estate that came to the husband by his marriage with her).

⁶ If the intestate leave no lawful issue, the whole of the real estate goes to the widow: Ann. St. 1889, § 2270, pl. 2.

⁷ If the intestate leave children or descendants, one-half to surviving wife; if none, three-fourths; and if not exceeding \$10,000 in value, all. Dower and curtesy abolished: Rev. St. 1887, § 2221.

⁸ *Post*, § 423.

is but a faint preponderance in favor of any of the individuals constituting the family. If the brothers and sisters are still in their infancy, the rational course of devolution would seem to point to the father as the natural head and usually the supporter of the family;¹ or in case of his prior decease, to the mother; and only in case of the prior decease of both, to the brothers and sisters. But even these considerations lose significance as the members of the family grow older and become independent, gradually loosening the bonds which [*138] connect them with * the original stock as they found new families themselves. Hence, while there is perfect unanimity in according the first claim to the inheritance to the children of the intestate, including, with almost equal consensus, the descendants of deceased children by right of representation, legislators differ as to who should be preferred if there are no children, or issue of children.

Thus at common law, the father, as well as any lineal ascendant, is cut off from the inheritance in lands, while in the United States the course of descent is directed with greater regard to the exigencies of the family relation, the father and mother being recognized as the natural representatives of the family next after husband and wife. In default of any child or descendant, the residue of an intestate's estate, after payment of his debts and expenses of administration, and subject to the provisions for the immediate relief of the family and the paramount claims of husband or wife, are directed to go to the father, and if he be dead, to the mother, and if she be dead, to the brothers and sisters and the descendants of deceased brothers or sisters by representation, in Arkansas,² Colorado,³ Minnesota,⁴ New York,⁵ North Dakota,⁶ and South Carolina;⁷ to the father, and if he be dead, the mother together with brothers and sisters and descendants of such by representation, in Florida,⁸ Maine,⁹ Nebraska,¹⁰ Nevada,¹¹ New Hampshire,¹² Oklahoma,¹³ Oregon,¹⁴ Rhode Island,¹⁵ South Dakota,¹⁶ and West Virginia;¹⁷ to the father and mother in common in Alabama,¹⁸ Arizona,¹⁹

At common law, lineal ascendants cannot inherit land.

In default of issue, father inherits.

¹ As to the descent of the property of minors dying without issue and unmarried, see *infra*, § 70.

² Dig. of St. 1894, § 2470.

³ Mills' Ann. St. 1891, § 1524.

⁴ Gen. St. 1891, § 5677.

⁵ 2 Banks & Bro. (9th ed.) 1896, p. 1824, §§ 5, 6.

⁶ Code, 1895, § 3742.

⁷ Rev. St. 1893, § 1980.

⁸ Rev. St. 1892, § 1820.

⁹ Rev. St. 1884, ch. 75, § 1.

¹⁰ Cons. St. 1893, § 1123-30.

¹¹ Gen. St. 1885, § 2981.

¹² Pub. St. 1891, ch. 196, § 1, pl. 2, 3.

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¹³ St. 1890, § 6893.

¹⁴ Code, 1887, § 3098.

¹⁵ Gen. L. 1896, p. 733, § 1.

¹⁶ Comp. L. 1887, § 3381.

¹⁷ Code, 1891, ch. 78, § 1.

¹⁸ Code, Ala. 1896, § 1453, pl. 2. If only one parent, one-half to such, and one-half to brothers and sisters; but if no brother or sister or descendant, all to such parent.

¹⁹ But if either be dead, then one-half to the survivor, and the other half to the decedent's brothers and sisters or their descendants by representation in common; if no brother or sister nor descendant of

Father and mother jointly or in common. Father inherits equally with brothers and sisters.

Father postponed to brothers and sisters. Father, mother, brothers and sisters, and descendants equally.

California,¹ Idaho,² Indiana,³ Iowa,⁴ Kansas,⁵ Kentucky,⁶ Massachusetts,⁷ Michigan,⁸ Montana,⁹ Pennsylvania,¹⁰ * Texas,¹¹ Utah,¹² Vermont,¹³ [* 139] Washington,¹⁴ Wisconsin,¹⁵ and Wyoming.¹⁶ The father takes, if the intestate leaves no issue, subject to the rights of husband or wife equally with brothers and sisters in Georgia.¹⁷ He is postponed to the brothers and sisters in Connecticut,¹⁸ Delaware,¹⁹ Mississippi,²⁰ New Jersey,²¹ North Carolina,²² Ohio,²³ and Tennessee.²⁴ Father, mother, brothers and sisters and their descend-

such, the whole to the father or mother: Rev. St. 1887, ¶ 1459.

¹ If no issue, one-half to father and mother, or to the survivor, the other half to husband or wife; if neither father nor mother, the other half to brothers and sisters and descendants of such by representation; if no husband or wife, nor brother or sister or descendant of such, the whole estate to the father and mother or survivor of them; Civ. Code, § 1386.

² One-half to husband or wife, the other half to father and mother in equal shares, or if one be dead, the whole of the other half to the survivor; if no father or mother, this half goes to brothers and sisters, and their descendants by representation; if there be no husband or wife, the whole to father and mother in equal shares, or if either be dead, the whole to the other: Rev. St. 1887, § 5702.

³ To father and mother as joint tenants, or if either be dead, to the survivor the one-half, the other half to brothers and sisters, and their descendants by representation; if neither father nor mother, then to the brothers and sisters and descendants of deceased brothers or sisters by representation, in common; if no brothers or sisters nor descendants, then to father and mother in common, or if either be dead, then to the survivor: Rev. St. 1894, §§ 2624, 2625.

⁴ If no issue, half to wife, half to parents; if no wife, all to parents; if one be dead, the whole to the other; if both be dead, to their heirs: Ann. Code, 1888, § 3659.

⁵ If no issue or wife, the whole estate goes to the parents, or the survivor, if one be dead; if both be dead, then to the

heirs of the last survivor: Gen. St. 1889, §§ 2611, 2612.

⁶ St. 1894, § 1393, pl. 2, 3.

⁷ Publ. St. 1882, ch. 125, § 1.

⁸ How. Ann. St. (Supplement, 1890) § 5772 a.

⁹ To survivor, if one be dead; Const. & Codes, 1895, § 1852.

¹⁰ Life estate during their joint lives and the life of the survivor, in the real estate; the personalty to them absolutely; and if there be no brothers or sisters of the whole blood, nor descendants of such, then the whole estate absolutely, to father and mother, or the heirs of the survivor if one be dead: Pepper & Lewis' Dig. 1896, p. 2410, § 5.

¹¹ If only father or mother survive, one-half to such father or mother, and one-half to brothers and sisters: Gen. St. 1895, art. 1688.

¹² Rev. St. 1898, § 2828. If either be dead, all to survivor.

¹³ St. 1894, § 2544.

¹⁴ St. & Codes, 1891, § 1480.

¹⁵ Sanb. & B. Ann. St. 1889, § 2270.

¹⁶ Three-fourths to husband or wife, one-fourth to father and mother, or the survivor if one be dead: Rev. St. 1887, § 2221.

¹⁷ Code, 1895, § 3355, pl. 6.

¹⁸ In common with the mother: Gen. St. 1887, § 630.

¹⁹ Rev. Code, 1874, ch. 85, § 1.

²⁰ Ann. Code, 1892, § 1543.

²¹ Gen. St. 1896, p. 1194, § 3.

²² In the real estate: Code, 1883, § 1281, rule 6. The personalty goes to the next of kin in the absence of a widow and children: Ib., § 1478, par. 5.

²³ Bates' Ann. St. 1897, §§ 4158, 4159.

²⁴ Code, 1884, § 3268 *et seq.*

ants by representation take equal shares in Illinois,¹ Louisiana,² and Missouri.³ The father is postponed to the mother in Utah.⁴

Father postponed to mother.

The effect on the inheritance of the father, of the distinction made in many States between ancestral estates and estates acquired by the intestate otherwise than by descent, devise, or gift from an ancestor, will be considered in connection with the descent to brothers and sisters.⁵

Father's right in ancestral estates.

§ 69. **The Mother as Heiress; Adopted Children.**—

The mother, as will appear from the preceding section discussing the order in which the father is entitled to inherit from his child, is preferred to the father in Utah only, but in some States takes equally with him.⁶ In other States, she is postponed to the father, taking in preference to brothers and sisters and their descendants,⁷ or takes equal shares with them;⁸ and in some States she is postponed to them also.⁹ In Illinois, Louisiana, and Missouri, father, mother, brothers and sisters, and their descendants, take equally. The mother takes in preference to the father in Utah.

Mother takes equally with father.

Postponed to father, but preferred to brothers and sisters, or equal with them.

Postponed to brothers and sisters.

Father, mother, brothers and sisters, equally.

The course of descent, where the intestate leaves neither issue nor parents, is in some States indicated by directing the estate to pass as if the parents had survived the intestate and died in possession of the portion coming to them, one-half going to the heirs of each. In such case the heirs, how-

Descent to heirs of parents.

ever, inherit not from such father or mother, but directly [* 140] from the intestate.¹⁰ And where the estate is directed to *go

¹ Except that if either parent be dead, the survivor takes a double share: St. & C. St. 1896, p. 1426, pl. 1.

² One-half to parents, and one-half to brothers and sisters: Voorhies' Rev. Civ. C. 1886, art. 903 *et seq.*

³ Rev. St. 1889, § 4465.

⁴ But if no mother, then the father takes one-half in preference to the issue of deceased brothers or sisters: Comp. L. 1888, § 2741.

⁵ Post, § 70.

⁶ In Arizona, California, Connecticut, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Pennsylvania, Texas, Vermont, Washington, Wisconsin, and Wyoming.

⁷ So, for instance, in Arkansas, Colorado, Minnesota (since 1891), Nevada, New Hampshire, New Jersey (a life estate, remainder to brothers and sisters),

New York, North Carolina, and North Dakota.

⁸ In California, Florida, Maine, Mississippi, Nebraska, Oklahoma, Oregon, South Carolina, South Dakota, Virginia, and West Virginia.

⁹ But preferred to more remote kin in Alabama, Delaware, Georgia, Mississippi, Ohio, and Tennessee.

¹⁰ Hence the property descending is not controlled or affected by ownership in the deceased parents; it passes to their legal heirs, not to their devisees or legatees: *Lash v. Lash*, 57 Iowa, 88, 90. This decision seems inconsistent with the case of *Moore v. Weaver*, 53 Iowa, 11, where the widow of a deceased father of the intestate was allowed to take the share to which she would have been entitled if her husband had survived the intestate. See also *Leonard v. Lining*, 57 Iowa, 648, in consonance with *Lash v. Lash*.

in moieties, one to the next of kin of the father, and the other to the next of kin of the mother, each moiety will pass, as if it were an independent estate, to the next of kin in its respective line, without regard to their relative nearness to the intestate.¹

Provision is made in several States for the legal adoption of children by others than their parents, whereby they become members of the family of the person or persons so adopting, and by force of the statute entitled to all the rights accorded by the law to natural children, including the right of inheritance.² So far as their own footing in this respect is concerned, it is precisely equal to that of other lawful children;³ and hence they take no share of an estate willed to others, if they are intentionally omitted in the will.⁴ It has been held that the right of inheritance does not extend to inheritance by representation through the adopting father, from another person.⁵ But the right to inherit

Children by adoption inherit like natural children from adopting parents,

but not by representation through them.

¹ McKinny v. Abbott, 49 Tex. 371, 375; Jones v. Barrett, 30 Tex. 637, 642.

² See Woerner on Guardianship, §§ 10, 11, where the law in connection with the adoption of children and the right of inheritance by, through, and from them is fully discussed. In Ohio there is a statute providing that any person of sound mind may by written declaration filed in the probate court appoint another to stand toward the declarant as heir at law at his death; thereupon such appointee has the same rights as a child of declarant: Bird v. Young, 56 Ohio St. 210.

³ Vidal v. Commagère, 13 La. An. 516; Burrage v. Briggs, 120 Mass. 103; Newman's Estate, 75 Cal. 213; Warren v. Prescott, 84 Me. 483; Fosburgh v. Rogers, 114 Mo. 122; Johnson's Appeal, 88 Pa. St. 346, 353; Lunay v. Vantyne, 40 Vt. 501; Wagner v. Varner, 50 Iowa, 532; Hosser's Succession, 37 La. An. 839. In Buckley v. Frasier, 153 Mass. 525, it was held that a child by adoption is "issue" within the meaning of the Statute of Descents; so also in Atchison v. Atchison, 89 Ky. 489, holding that it was to be so regarded in determining the right of the adoptive mother as widow; to same effect in Indiana: Markover v. Krauss, 132 Ind. 294, holding the rights of a widow by a second marriage, where there were children jointly adopted by the husband and first wife, to be fixed as if such adopted children were children of the first wife (two judges dissenting); see also Patterson v.

Browning, 146 Ind. 160; so, also, in Missouri the adopted child determines the rights of the widow as if a natural child of the deceased: Moran v. Stewart, 122 Mo. 295; s. c. 132 Mo. 73. But where the child is adopted by the husband merely, it does not by reason thereof become the heir of the wife: Sharkey v. McDermott, 16 Mo. App. 80; Keith v. Ault, 144 Ind. 626. In Alabama a devise to "children" in a will excludes a child adopted subsequently thereto: Russell v. Russell, 84 Ala. 48. A child by adoption cannot inherit from the parent by adoption, unless the act of adoption has been in strict accord with the statute: Renz v. Drury, 57 Kans. 84 and cases cited; McCollister v. Yard, 90 Iowa, 621, 628, distinguishing this case from one where the fault in failing to properly adopt lay with a public officer, who failed to properly record the deed, which had been held not to avoid the adoption.

⁴ Bowdlear v. Bowdlear, 112 Mass. 184; Sharkey v. McDermott, 16 Mo. App. 80, 87.

⁵ Quigley v. Mitchell, 41 Oh. St. 375; Estate of Sunderland, 60 Iowa, 732 (two of the judges in this case dissenting, holding that there was no distinction in this respect); Keegan v. Geraghty, 101 Ill. 26; Barnhizel v. Ferrell, 47 Ind. 335. Schouler, in his work on Domestic Relations, says, "An adopted child usually inherits from the adopting parent, and vice versa; but otherwise as to collateral

from an adopted child is not always given to the persons adopting. In Missouri it is held that the heirs of the adopted child are its relations by blood, and not those by adoption, although the estate descending had been derived from the adopting parent.¹ In Indiana the syllabus of a case announced the same principle, as decided by the Supreme Court of that State;² but the court, in later cases, point out that they had never so decided, and establish the principle that the adopting parents take in preference to *the natural parents.³

Inheritance from adopted children.

This seems to be the more consistent and reasonable doctrine; and it was intimated, though not decided, that the rule includes property which came to the adopted child from any source other than by inheritance from kinsmen of its own blood.⁴ But where the adopted child, dying before the adopting parents, leaves issue, such issue take as if they were grandchildren,⁵ as was the rule under the Roman law.⁶

The right of an adopted child given by the statute of one State follows it and is valid in all other States.⁷ But while the right to inherit is undoubtedly secured by the statute to the full extent of that of natural children, yet the identity of the child is not thereby changed; hence a devise to one for life, "with remainder to her children," does not include an adopted child of such life tenant;⁸ and so the exemption from the inheritance tax secured to children does not extend to adopted children.⁹

Right of inheritance given by statute follows adopted child in all other States.

Identity of child not changed by the adoption.

A statute of Massachusetts providing that "no person shall, by being adopted, lose his right to inherit from his natural parents or kindred," was held not to entitle an adopted child, who was also a grandson of the adopting father, to inherit from his grandfather

kindred": § 232, note 5. *Helms v. Elliott*, 89 Tenn. 446; *Warren v. Prescott*, 84 Me. 483 (by statute).

¹ *Reinders v. Koppelman*, 68 Mo. 482, 494.

² *Krug v. Davis*, 87 Ind. 590.

³ *Davis v. Krug*, 95 Ind. 1; *Paul v. Davis*, 100 Ind. 422.

⁴ *Humphries v. Davis*, 100 Ind. 274. But property inherited from the natural parents descends to them as their kindred: *Hole v. Robbins*, 53 Wis. 514.

⁵ *Power v. Hafley*, 85 Ky. 671; *Gray v. Holmes*, 57 Kans. 217 (holding that the widower and child of a deceased adopted child inherited as heirs of the adopter), 221.

⁶ *Per Merrick, C. J.*, in *Vidal v. Commagère*, 13 La. An. 516, 517; *Martin, C. J.* in *Gray v. Holmes*, 57 Kans. 217, 221.

⁷ *Estate of Sunderland*, 60 Iowa, 732; *Ross v. Ross*, 129 Mass. 243; *Van Matre v. Sankey*, 148 Ill. 536 (to the extent that such *status*, or the rights flowing therefrom, are not inconsistent with or opposed to the laws and policy of the State where it is sought to be availed of), 559; *Melvin v. Martin*, 18 R. I. 650; *Gray v. Holmes*, 57 Kans. 217 (holding that the method of adoption in the respective States might be different, if the rights thereby conferred were substantially the same), 219.

⁸ *Schafer v. Eneu*, 54 Pa. St. 304, 306; a similar decision was made under the Massachusetts statute, where the remainder was limited to the "heirs at law": *Wyeth v. Stone*, 144 Mass. 441.

⁹ *Commonwealth v. Nancrede*, 32 Pa. St. 389.

in the twofold capacity of son and grandson, but only in the former.¹

§ 70. **Brothers and Sisters: Heirs of the Whole and of the Half Blood.**—The next degree in the order of succession is that of brothers and sisters and their descendants. These are not in the descending or ascending line of propinquity, but are collateral to the intestate. Since the brothers and sisters themselves are members of the immediate family to which the intestate belonged, they are (where the intestate left no children, and after the husband and wife) more nearly interested in the intestate's property than any other relatives except the father and mother, aside from the question of consanguinity. Hence the law casts upon them the descent of such property, if there are no children, subject to the rights of husband or wife, if any, and generally in connection with father or mother, or both. If any of them died before the intestate, leaving descendants, these represent their deceased parents and take, in all cases, the share of such parent collectively; * that is, [* 142] all the children of a deceased brother or sister take together the share which the deceased brother or sister would have taken if he had survived the intestate. And in many States the principle is extended further: if any of the children of a deceased brother or sister died before the intestate, his children take collectively the share which he would have taken if he had survived; and so on in every generation of descendants from a deceased brother or sister.

Where brothers and sisters take in default of children, subject to husband or wife's rights.

Brothers and sisters, and their descendants by representation as above stated, take, in default of children, and subject to the rights of husband or wife, to the exclusion of parents and more remote kindred in Connecticut,² Delaware,³ Mississippi,⁴ New Jersey,⁵ North Carolina,⁶

Ohio,⁷ Pennsylvania,⁸ and Tennessee;⁹ postponed to the father, but together with the mother, excluding more remote kindred, in Florida,¹⁰ Georgia,¹¹ Indiana,¹² Maine,¹³ Nebraska,¹⁴ Nevada,¹⁵ New Hampshire,¹⁶ Oklahoma,¹⁷ Oregon,¹⁸ Rhode Island,¹⁹

¹ Delano v Bruerton, 148 Mass. 619.

² Gen. St. 1887, § 630. But only those of the full blood; those of the half blood are postponed to parents.

³ Rev. Code, 1874, ch. 85, § 1.

⁴ Ann. Code, 1892, § 1543.

⁵ Like Connecticut: Gen. St. 1896, p. 1193, § 2.

⁶ As to real estate: Code, 1883, § 1281.

⁷ Bates' Ann. St. 1897, § 4159.

⁸ Subject to parents' life estate in the realty, real and personal estate to brothers and sisters of the full blood; those of the half blood are postponed to nephews and

nieces, and also to the parents: Pepper & Lewis' Dig. 1896, p. 2411, § 6.

⁹ Code, 1884, §§ 3268 *et seq.*

¹⁰ Rev. St. 1892, § 1820.

¹¹ Code, 1892, § 2484.

¹² Rev. St. 1894, § 2625.

¹³ Rev. St. 1884, ch. 75, § 1.

¹⁴ Cons. St. 1893, § 1123-30.

¹⁵ Gen. St. 1885, § 2981.

¹⁶ Publ. St. 1891, ch. 196, § 1, pl. 2, 3.

¹⁷ St. 1890, § 6893.

¹⁸ Code, 1897, § 3098.

¹⁹ Gen. L. 1896, p. 733, § 1.

[* 143] South Carolina,¹ South Dakota,² Texas,³ Virginia,⁴ * and West Virginia;⁵ postponed to both parents, if both be living, but together with the survivor, if one be dead, in Alabama,⁶ Arizona;⁷ postponed to both parents in Arkansas,⁸ California,⁹ Colorado,¹⁰ Idaho,¹¹ Kentucky,¹² Massachusetts,¹³ Michigan,¹⁴ Minnesota,¹⁵ New York,¹⁶ North Dakota,¹⁷ Wisconsin,¹⁸ and Washington.¹⁹ If there be no descendants, the brothers and sisters and their descendants by representation take, subject to the rights of husband or wife, together with father and mother, each an equal part, in Illinois,²⁰ Missouri,²¹ and Wyoming;²² in Louisiana father and mother take one-half together, and brothers and sisters and their descendants by representation the other half.²³

Brothers and sisters having the same father and mother are related to each other by the whole blood; if they have the same father but a different mother, or the same mother but a different father, they are related to each other by the half blood. This difference in the consanguinity of collateral kindred has given rise to some divergence in the laws of different countries regulating the devolution of property. Under the artificial system of the common law, collateral kindred of the half blood were entirely excluded from the inheritance of land,²⁴ while in the distribution of the personalty no distinction is recognized between brothers and sisters of the whole blood and those of the half blood; "for they [the half blood] are of the

¹ Rev. St. 1893, § 1980.

² Comp. L. 1887, § 3381.

³ If both parents survive, the estate goes to them; but if only one parent survive, then one half to such parent, and the other half to brothers and sisters: Gen. St. 1895, art. 1688.

⁴ Code, 1887, § 2548.

⁵ Code, 1891, ch. 78, § 1.

⁶ Code, Ala. 1896, § 1453.

⁷ Rev. St. 1887, ¶ 1459.

⁸ Dig. of St. 1894, § 2470, pl. 2.

⁹ Civ. Code, § 1386.

¹⁰ St. 1891, § 1524.

¹¹ Rev. St. 1887, § 5702.

¹² St. 1894, § 1393.

¹³ Publ. St. 1882, ch. 125, § 1.

¹⁴ How. Ann. St. 1890 (Supplement), § 5772 a.

¹⁵ Gen. St. 1891, § 5677.

¹⁶ 2 Banks & Bro. (9th ed. 1896) p. 1824, §§ 5, 6.

¹⁷ Rev. Code, 1895, § 3742.

¹⁸ Ann. St. 1889, § 2270.

¹⁹ 1 Hills' Ann. St. 1891, § 1480.

²⁰ But if one parent be dead, the other

takes a double portion: St. & Curt. St. 1896, p. 1426, § 1, pl. 2.

²¹ Rev. St. 1889, § 4465.

²² If no husband or wife, and no children nor descendants: Rev. St. 1887, § 2221.

²³ Voorhies' Rev. Code, 1888, art. 903 *et seq.*

²⁴ Blackstone makes a gallant attempt to justify this feature of the English law of descent, or at least to palliate its harshness. "It is certainly a very fine-spun and subtle nicety," he says (2 Comm. 230), "but considering the principles upon which our law is founded, it is not an injustice, nor always a hardship; since even the succession of the whole blood was originally a beneficial indulgence." His candor, however, induces him to admit that this element of the common law is not his ideal of the perfection of human reason. "I must be impartial enough to own that, in some instances, the practice is carried further than the principle upon which it goes will warrant." (Ib., 231.)

kindred of the intestate, and only excluded from inheritances of land upon feudal principles."¹

In the American States there is but little difference between the rules of descent of real, and of the distribution of personal property,

save as to the rights of surviving husband or widow;² but there is a noticeable divergence among the several States as to the rules affecting the * inher- [* 144] itance of kindred of the whole and of the half

blood. In respect of ancestral estates, that is to say, estates acquired by the intestate by gift, devise, or descent,³ the distinction in blood between full and half brothers and sisters is implied in the discrimination between the descent of ancestral and other estates, since the States recognizing this dis-

tinguinction exclude from the inheritance all descendants of the intestate not of the blood of the ancestor from whom the estate came, whether brothers and sisters of the

half blood take equally with those of the whole blood in respect of estates acquired by the intestate otherwise than by gift, devise, or descent, or not. It is so enacted by statute, for instance, in Alabama,⁴ Arkansas,⁵ California,⁶ Delaware,⁷ Idaho,⁸ Indiana,⁹ Maryland,¹⁰ Michigan,¹¹ Minnesota,¹² Montana,¹³ Nebraska,¹⁴ Nevada,¹⁵ New Jersey,¹⁶ New York,¹⁷ North Dakota,¹⁸ Ohio,¹⁹ Oklahoma,²⁰ Penn-

¹ 2 Bla. Comm. 505; *Crooke v. Watt*, Show. P. C. 108, cited in Wms. [1511]; s. c. 2 Vern. 124. But it must be remembered that this and subsequent decisions on this point were made upon the Statute of Descents.

² In Pennsylvania there is a difference in the rights of brothers and sisters of the whole blood and of the half blood to the real estate, but not to the personal estate of an intestate: *Pepper & L. Dig.* 1896, p. 2411, § 6, pl. 4, 5.

³ 4 Kent, *404. The technical term "ancestor" is here used in its technical, not its popular sense. See as to the devolution of ancestral estates, *post*, § 73.

⁴ Code, Ala. 1896, § 1457. This statute is construed as applying to those of the same degree only, by virtue of the statutory words "as against those of the same degree," distinguishing the decision from decisions in other States, based on their respective statutes: *Cox v. Clark*, 93 Ala. 400; reaffirmed in *Coleman v. Foster*, 112 Ala. 506.

⁵ Dig. of St. 1894, § 2481.

⁶ Civ. Code, 1885, § 1394.

⁷ Code, 1874, ch. 85, § 1.

⁸ Rev. St. 1887, § 5705.

⁹ Ann. St. 1894, § 2627. This statute has been held to apply to heirs in the same degree only, so that if there be no brother or sister of the whole or half blood of the intestate having the blood of the ancestor, a half brother not of the blood of the ancestor takes to the exclusion of kindred of the blood of a more remote degree: *Pond v. Irwin*, 113 Ind. 243. Except as to ancestral estates, brothers of the half blood take equally with those of the full blood: *Anderson v. Bell*, 140 Ind. 375.

¹⁰ Publ. Gen. L. 1888, art. 46.

¹¹ Howell's Ann. St. 1882, § 5776 a.

¹² Gen. St. 1891, § 5678.

¹³ Codes & St. 1895, § 1860.

¹⁴ Cons. St. 1893, § 1128.

¹⁵ Gen. St. 1885, § 2984.

¹⁶ Gen. St. 1896, p. 1194, § 5.

¹⁷ 2 Banks & Bro. (9th ed.) 1896, p. 1825, §§ 8 *et seq.*

¹⁸ Rev. Code, 1895, § 5751.

¹⁹ Bates' Ann. St. 1897, § 4158, pl. 3.

²⁰ St. 1890, ch. 88, art. iv. §§ 6, 7.

sylvania,¹ Rhode Island,² South Dakota,³ Tennessee,⁴ Utah,⁵ and Wisconsin.⁶ The kindred "not of the blood of the ancestor," which these statutes exclude from the inheritance, are sometimes held to be limited to the next of kin of the half blood of the intestate.⁷ The distinction between ancestral and other estates is ignored, either tacitly, or, as in some instances, by express enactment; as, for instance, in Arizona⁸ and Texas.⁹ Brothers and sisters of the half blood are, in most of the above-named States, entitled to the same shares of the inheritance as those of the whole blood, except as they are affected by the doctrine of ancestral estates; while in many States brothers and sisters of the half blood take half shares, and those of the whole blood whole shares, as, for instance, in Arizona, Colorado,¹⁰ Florida, Kentucky, Louisiana,¹¹ Missouri, Texas, Virginia, and West Virginia; but if, in such States, there be only half brothers or sisters entitled to the inheritance, they take whole shares; and where half brothers and sisters, entitled to half shares only, take together with ascendants, such ascendants take double shares.¹² In some of the States brothers and sisters of the half blood are not distinguished in the statutes of descent from those of the whole blood, as in Illinois, Iowa, Michigan, and New Hampshire; while in others they are expressly put in the same class, if in the same degree of propinquity to the intestate; as, for example, in Kansas,¹³ Maine,¹⁴ Massachusetts,¹⁵ Oregon,¹⁶ Vermont,¹⁷ and Washington.¹⁸ In some States brothers and sisters of the whole blood, and the descendants of deceased brothers and sisters of the whole blood by representation, constitute a class entitled to the inheritance.

Distinction between ancestral and other estates ignored.

Half brothers and sisters take same as those of the whole blood in non-ancestral estates.

Half brothers and sisters half, whole brothers and sisters whole, shares.

No distinction between brothers and sisters of the half and whole blood.

Half blood in same class with whole blood.

Brothers and sisters of the whole blood and their descendants as a class preferred to half brothers and sisters.

¹ Pepper & L. Dig. 1896, p. 2413, § 11.

² Gen. L. 1896, p. 734, § 6.

³ Comp. L. 1887, § 3401, pl. 7, 8.

⁴ Code, 1884, § 3269.

⁵ Rev. St. 1898, § 2840. See *Amy v. Amy*, 12 Utah, 278, 335.

⁶ St. 1889, § 2272.

⁷ See *post*, § 73, as to the devolution of ancestral estates.

⁸ Rev. St. 1887, § 1461.

⁹ Rev. St. 1895, art. 1690. An exception is made in this State, in the case of an adopted child, so much of whose property as has come to him from such adopting person reverts back to the donor.

¹⁰ Children and descendants of the half blood inherit the same as those of the

whole blood; but collateral relatives of the half blood only half shares: *Mills' Ann. St. 1891*, § 1526.

¹¹ Brothers and sisters german take in the two (paternal and maternal) lines; other brothers and sisters in the paternal or maternal line only, as the inheritance may come through the paternal or maternal line: *Voorhies' C. C. 1889*, art. 120.

¹² Rev. St. Mo. 1889, § 4468.

¹³ Gen. St. 1889, § 2620.

¹⁴ Rev. St. 1883, ch. 75, § 2.

¹⁵ Publ. St. 1882, ch. 125, § 2.

¹⁶ Hill's *Ann. St.* § 3103.

¹⁷ St. 1894, § 2545.

¹⁸ Hill's *St. & Codes*, § 1480, pl. 7.

ance in preference to half brothers and sisters and their descendants as a class; so in Connecticut,¹ Delaware,² Maryland,³ Mississippi,⁴ New Jersey,⁵ Ohio,⁶ and Pennsylvania.⁷ In this State, brothers and sisters of the whole blood exclude nephews and nieces; and these, if descended from full brothers or sisters deceased, exclude brothers and sisters of the half blood.⁸ In Wyoming children and descendants of the half blood take same as those of the whole blood; but collaterals of the half blood, if there be also collaterals of the whole blood, only one half of the measure of collaterals of the whole blood.⁹ It seems well settled in England and America, that when brothers and sisters are mentioned in a statute, the half blood are included, unless there be some contravening provision.¹⁰

* A distinction is also made, in the statutes of many States, [* 145] between the descent of the estates of adults and of minors not

having been married, in recognition of the integrity of the family. The property of a minor, before the law permits him to dispose of it at his own will, and before he has contracted new relations and obligations by marrying, is substantially the property of the family of which he is a member, and on his death should descend to the other members of such family.¹¹ Hence these statutes direct the reversion of the property of such a minor to the donor, or to the parent from whom it came, if still living, or, if the estate consists of his distributive share of a parent's estate to the brothers and sisters or representatives of deceased brothers and sisters, just as if they had inherited directly from such deceased parent, or as if the minor had died before his father.¹² Statutes of such and similar import are found in Arkansas, California,¹³ Connecticut,¹⁴ Florida,¹⁵ Kentucky,¹⁶ Maine,¹⁷ Massa-

¹ Gen. St. 1887, § 632.

² Rev. Code, 1874, ch. 85, § 1.

³ Publ. Gen. St. 1888, art. 46, pl. 19, 20.

⁴ Ann. Code, 1892, § 1544. This statute has been construed as excluding brother or sister of the half blood in favor of descendants of deceased brothers and sisters of the whole blood, when all brothers and sisters of the whole blood had died before the testator: *Scott v. Terry*, 37 Miss. 65.

⁵ Gen. St. 1896, p. 1194, § 5.

⁶ Rev. St. 1890, § 4159; *Stemle v. Martin*, 50 Oh. St. 495, 519.

⁷ *Pepper & L. Dig.* 1896, p. 2412, § 8.

⁸ *Br. Purd. Dig.* p. 931, § 25.

⁹ Rev. St. 1887, § 2223.

¹⁰ *Tracy v. Smith*, 2 Lev. 173; *Crooke*

v. Watt, 2 Vern. 124; *Gardner v. Collins*, 2 Pet. (27 U. S.) 58, 87; *Baker v. Chalfant*, 5 Whart. 477, 479; *Clay v. Cousins*, 1 T. B. Mon. 75, 76; *Clark v. Sprague*, 5 Blackf. 412, 414; *Beebee v. Griffing*, 14 N. Y. 235; *Rowley v. Stray*, 32 Mich. 70, 75.

¹¹ *Nash v. Cutler*, 16 Pick. 491, 499.

¹² *Estate of North*, 48 Conn. 583, 586, citing other cases.

¹³ *Deering's Civ. C.* § 1338, pl. 7, 8.

¹⁴ Gen. St. 1887, § 632. See *North's Estate*, 48 Conn. 583.

¹⁵ Rev. St. 1892, § 1821.

¹⁶ St. 1894, § 1401. See *Walden v. Phillips*, 86 Ky. 302; *Smith v. Smith*, 2 Bush, 520.

¹⁷ Rev. St. 1883, ch. 75, § 1, pl. vi. See *Benson v. Swan*, 60 Me. 160.

chusetts,¹ Michigan,² Minnesota,³ Nebraska,⁴ Nevada,⁵ Oklahoma,⁶ Oregon,⁷ Virginia,⁸ Washington,⁹ Wisconsin,¹⁰ and possibly others. They apply, generally, to property inherited from one of the intestate's parents only;¹¹ where the inheritance is taken from a more remote ancestor by right of representing a nearer ancestor, it cannot be regarded as coming from the latter;¹² and if, in such case, there be no brothers or sisters surviving the death of the minor, the ordinary rules of descent govern.¹³ In the absence of statutory discrimination, the rule is the same whether the estate is real or personal.¹⁴

An exception to the general rules of descent, cognate in its nature to the above, has also been made in respect of the devolution of property granted to an intestate in consideration of love and affection, which, in case of the death of such grantee without issue, is directed to revert to the grantor.¹⁵

Reversion of property granted in consideration of love and affection.

[* 146] * § 71. **Descendants taking by Representation.**—The reciprocal relationship between husband and wife, parents and children, and between the children themselves, or brothers and sisters, exhausts the sphere of those intimate bonds which unite the family proper, in its primary and most restricted sense. The descendants of the children, or of the brothers and sisters, are not included in this sphere, because they belong to a distinct family, which, although closely allied to the former as springing from one of its members, owes its integrity to the addition of a new ingredient: the child or brother or sister has married; the issue of such marriage is equally allied to the family of its father and of its mother. Hence, during the lifetime of the child, sister or brother, parent of the issue of the new family, the law looks upon such issue as not belonging to the original family of either of its parents, and excludes it from the inheritance left upon the death of any of its members, the parent himself being entitled thereto. But if the parent of the new family died before the intestate member of the old family, the law recognizes such issue as being entitled to what

¹ *Goodrich v. Adams*, 138 Mass. 552.

² *How. Ann. St.* 1890, § 5772 *a*. See *Burke v. Burke*, 34 Mich. 451.

³ *Gen. St.* 1891, § 5677, pl. 7, 8.

⁴ *Cons. St.* 1893, §§ 1123–30.

⁵ *Gen. St.* 1885, § 2981.

⁶ *St.* 1890, ch. 88, art. iv. §§ 6, 7.

⁷ *Hill's Ann. St.* 1887, § 3098, pl. 6.

It is held that the statute of this State, omitting a part of the English Statute of Distribution, after which it is modelled, applies only to persons dying leaving children and also issue of a deceased child, and does not apply where the

deceased leaves only living children: *Stitt v. Bush*, 22 Oreg. 239, 241.

⁸ *Code*, 1887, § 2556.

⁹ *Hill's St. & C.* 1891, § 1480.

¹⁰ *St.* 1889, § 2270, pl. 5, 6. *Shuman v. Shuman*, 80 Wis. 479, 481.

¹¹ *Decoster v. Wing*, 76 Me. 450; *Cables v. Prescott*, 67 Me. 582; *Power v. Dougherty*, 83 Ky. 187.

¹² *Sedgwick v. Minot*, 6 Allen, 171.

¹³ *Decoster v. Wing*, *supra*; see *Goodrich v. Adams*, 138 Mass. 552.

¹⁴ *Decoster v. Wing*, *supra*.

¹⁵ *Ann. St. Ind.* 1894, § 2628; *Amos v. Amos*, 117 Ind. 37.

Right to take by representation in all descendants of children; in some States to descendants of brothers and sisters; in others to children of such brothers and sisters.

the deceased child, brother or sister, would have been entitled to if he had survived the intestate.¹ Thus the issue of deceased children, brothers and sisters, are substituted for or put into the place of their parents in the line of inheritance, that is, they *represent* them, and are therefore said to take *by representation*. The right to take by representation is secured to the descendants of children in all the States; and to the descendants of brothers and sisters in many of them, through all descending generations, *while in others the [*147]

right to take by representation is limited to the children of brothers and sisters.²

* The rule prohibiting representation of collaterals further [*148] than by children of the intestate's brothers and sisters, is adopted from the English Statute of Distribution, and has been frequently asserted, both in England and America. In the case of *Carter v. Crawley*,³ arising a few years after its passage, its language was construed, and the reasons upon which the enactment was supposed to stand, fully stated.⁴ The construction then put upon it has been the English law ever since.⁵

¹ *Ante*, § 70.

² The question whether the right to take by representation exists or not, has an important bearing in ascertaining the heirship of persons related to the intestate in a remote degree, which is fairly illustrated by the facts of a case decided lately in Georgia. T., dying intestate as to a portion of her estate, left surviving grandchildren of an aunt, and also great-grandchildren of a deceased brother, claiming through W., their mother, the grandchild of the brother, who had died before the intestate. The statute of Georgia fixes the order in which certain of the relatives of intestates are entitled to the inheritance *nominatim*, and then provides "that the more remote degrees of kindred shall be determined by the rules of the canon law, as adopted and enforced in the English courts prior to the 4th of July, 1776." It also provides for representation as far as grandchildren of brothers and sisters. According to the rules of the canon law, the grandchildren of the aunt were in the third, and the great-grandchildren of the brother in the fourth degree, and it was accordingly decided that the former were entitled to the inheritance. If W., the grandchild of the brother, had been alive

at the time of the intestate's death, she would have taken to the exclusion of the other branch, by representation of her grandfather, who was a brother. But since the statute cut off representation after grandchildren of deceased brothers and sisters, her own children could take nothing by representation. If the degree of kinship in this case had been computed according to the rules of the civil law, the great-grandchildren of the brother would have been in the same degree with the grandchildren of the aunt, and would have been entitled equally with them, — aside from the question of representation, — *per capita*: *Wetter v. Habersham*, 60 Ga. 193.

³ T. Raym. 496.

⁴ "In respect of the intestate it may be thought an obligation upon every man to provide for those which descend from his loins; and as the administrator is to discharge all other debts, so this debt to nature should likewise exact a distribution to all that descend from him in the lineal degrees, be they never so remote. And because those which are remote have not so much of his blood, therefore the measure should be according to the stocks, more or less as they stand in relation to

⁵ *Wms. Ex.* [1512] and numerous authorities were cited.

The right to take by representation in the collateral line is limited to the children or grandchildren of brothers or sisters in Alabama,¹ Connecticut,² Georgia,³ Maine,⁴ Maryland,⁵ Massachusetts,⁶ Michigan,⁷ Mississippi,⁸ Nebraska,⁹ New Hampshire,¹⁰ New Jersey,¹¹ Pennsylvania,¹² South Carolina,¹³ and Vermont.¹⁴

It remains to notice another consequence of the rule allowing the children of deceased parents to take the parent's share by representation, applicable equally to lineal and collateral heirs taking by representation. If the heirs all stand in the same degree of consanguinity to the intestate, and take in their own right (none of them by representation), they take equal shares each (*per capita*); hence the three children of a deceased sister of the intestate and the only child of a deceased brother take each one-fourth part of the estate, in disregard of the number of those who may spring from a common parent, because in establishing the degree of kinship they do not represent such parent.¹⁵ But if some or one of the heirs claim in their

Heirs take *per capita* if all within the same degree of consanguinity; *per stirpes*, if by representation, where there are heirs also who take in their own right.

¹ Code, 1896, § 1455.

² Gen. St. 1887, § 632.

³ Code, 1895, § 3855, pl. 5.

⁴ Davis v. Stinson, 53 Me. 493.

⁵ Publ. Gen. L. 1888, art. 46, pl. 27; *McComas v. Amos*, 29 Md. 132, 138.

⁶ *Bigelow v. Morong*, 103 Mass. 287; *Conant v. Kent*, 130 Mass. 178; Publ. St. 1882, ch. 125, § 1, pl. 5. The phrase, "brothers and sisters and to the issue of any deceased brother or sister, by right of representation" is held not to apply when there is no brother or sister surviving because the statute, in such case, provides in clear words that the estate of the intestate shall go "to his next of kin in equal degree."

⁷ On the same ground as *Conant v. Kent*, *supra*; *Van Cleve v. Van Fossen*, 73 Mich. 342.

⁸ Ann. Code, 1892, § 1543.

⁹ *Douglas v. Cameron*, 47 Neb. 358.

¹⁰ Publ. St. 1891, ch. 196, § 3.

¹¹ It is held in this State that the statute securing the inheritance to the next in degree of consanguinity abolishes the common-law rule of representation, departing from *Den v. Smith*, 2 N. J. L. 2, which held that the term "issue" of brothers and sisters included all their descendants in whatever degree: *Schenk v. Vail*, 24 N. J. Eq. 538, 540; *Beasley, C. J.*, in *Taylor v. Bray*, 32 N. J. L. 182, 191.

¹² *Pepper & L. Dig.* 1896, p. 2412, § 10. Extended to grandchildren in 1855: *Perat's Appeal*, 102 Pa. St. 235, 258.

¹³ Rev. St. 1893, § 1980, pl. 4.

¹⁴ *Hatch v. Hatch*, 21 Vt. 450.

¹⁵ *Jansen v. Bury*, Bunb. 157.

him. Upon this reason representations are admitted to all degrees in the lineal descent. There is no such obligation to the remote kindred in a collateral line, therefore they are not regarded but in respect of proximity as they are next of kin, it being to be supposed every man would leave his estate to his next kindred: but the children of those that are deceased come not within this reason, for they are a degree more remote. . . . Now the case of a brother's children is of a mixed consideration: 1. In respect of

the obligation, for the intestate was a kind of parent to his brother's children, and in that respect marriages between them are forbidden. 2. There is no danger that the subdivisions should be very many and the estate reduced into very small parts; for brothers and sisters cannot be many, as cousin-germans and other remote degrees may, therefore there may be reason to admit brothers' children to distribution by representation, and reject all farther degrees": *Carter v. Crawley*, *supra*.

own right, — that is, by virtue of their degree of consanguinity, — and the * claim of others rests upon the representation [* 149] of a deceased parent or ancestor, who, if living, would be in that degree, then the latter take *per stirpes*, — that is, collectively as much as the deceased parent or ancestor would have taken, — while the former take *per capita*. The whole estate in such case is to be divided by the sum of the number of those claiming in their own right *plus* the number of *stirps* represented by descendants, the descendants collectively of each *stirps* taking his share. So that the thirty-two nephews and nieces of an intestate, and the twenty-five grand-nephews and grand-nieces and unknown heirs of a deceased niece, take, the former *per capita*, the latter *per stirpes*.¹

The question sometimes arises, whether advancements made to, or debts owing the intestate by, heirs who die before the intestate, leaving children who thereby become heirs, are to be deducted from the distributive shares of these children. It seems clear on principle, and is supported by the preponderance of adjudged cases, that, in the absence of a statutory regulation, a distinction must be drawn between *advancements* and *debts*; and also between heirs taking in their own right, and those taking by representation. Heirs taking in their own right directly from the intestate by virtue of their propinquity of blood, not being liable for the debts of their ancestors, and these because such ancestors died before the intestate, having no interest in the inheritance, so that there is no connection or correlation between the inheritance and the debt, take their

Liability of heirs by representation for debts of, and advancements to, their ancestors.

¹ *Copenhaver v. Copenhaver*, 9 Mo. App. 200. The statutory provisions interpreted in this case are as follows: Descent is, first, to the intestate's children or their descendants, in equal parts; second, if there be no children or descendants, then to his father, mother, brothers and sisters, and their descendants, in equal parts, &c. A further section declares that "when several lineal descendants, all of equal degree of consanguinity to the intestate, or his father, mother, brothers and sisters, or his grandfather, grandmother, uncles and aunts, or any ancestor living, and their children, come into partition, they shall take *per capita*, — that is, by persons; where a part of them are dead and part living, and the issue of those dead have a right to partition, such issue shall take *per stirpes*, — that is, the share of the deceased parent." The court held, that since, by the first section quoted, the descendants of brothers and sisters are distributees, and the statute does not,

as does the statute of Charles II., cut off representation among collaterals after brothers' and sisters' children, the last-quoted section applies, which determines that those standing in a remoter degree take by representation. This case was affirmed in 78 Mo. 55, and followed in *Aull v. Day*, 133 Mo. 337.

This rule is supported by numerous English and American authorities, and is universal in the direct lineal descent, but controlled by the provision found in many of the statutes of descents (mentioned above) which cut off representation in the collateral line after brothers' and sisters' children, or, in some States, their grandchildren. See 2 Bla. Comm. 217; 4 Kent Comm. 390; *Cox v. Cox*, 44 Ind. 368, 370; *Crump v. Faucett*, 70 N. C. 345; *Blake v. Blake*, 85 Ind. 65; *Nichols v. Shepard*, 63 N. H. 391; *Preston v. Cole*, 64 N. H. 459; *Sedgwick v. Minot*, 6 Allen, 171, 174; *Balch v. Stone*, 149 Mass. 39; *Garrett v. Bean*, 51 Ark. 52.

shares free from any deduction on account of debts owing by [* 150] their parents or ancestors to the intestate.¹ But heirs * taking by representation take not in their own right, but in virtue of the right transmitted to them by the deceased heir; hence it may be said that they can take no more than the latter could have taken if he had survived the intestate.² The same result follows where the statute declares that the issue of a deceased heir shall take such share only as would have descended to the parent if living at the death of the intestate.³ The distinction between debts owing by an heir and advancements made to him by the intestate is sharply drawn; in some States debts so owing cannot be deducted from the share of the heir in the real estate, and from the personal estate only by way of set-off,⁴ but the true principle seems to be that a debt owing by an heir constitutes part of the assets of the estate, as much as that of any other debtor, for which he should account before he can be allowed to receive anything out of the other assets;⁵ and it is so held in the United States.⁶ This point is also discussed in connection with the subject of advancements.⁷

§ 72. **Computation of the Next of Kin.**—It is thus seen, that in all the States brothers and sisters and the children of deceased brothers and sisters are placed in the first degree of collateral heirs, and that in the most of them all their descendants are relegated to the same degree by representation upon the death of intermediate ancestors. The further order of succession is indicated in some States by the statutes themselves, mostly placing grandfathers,

Brothers and sisters and their descendants in first class of collateral heirship.

¹ *Post*, § 554, p. * 1216; *Kendall v. Mondell*, 67 Md. 444; *Ilgenfritz's Appeal*, 5 Watts, 25; *Barnum v. Barnum*, 119 Mo. 63; *Carson v. Carson*, 1 Met. (Ky.) 300 (this case turned upon a statute giving to the issue of a legatee dying before the testator the estate willed to the legatee, but involves the same principle); *Simpson v. Simpson*, 16 Ill. App. 170, holding that the release by an heir of all claim and right as such in favor of his co-heirs would be enforced in equity if he survived the intestate, or as an executed contract binding on his heirs if not, but cannot operate to deprive his children of their right to inherit if he die before the intestate. To same effect: *Bishop v. Davenport*, 58 Ill. 105. In Louisiana this principle is established by several decisions: *Destrehan v. Destrehan*, 16 Mart. (vol. 4, n. s.) 557, 578; *Succession of Morgan*, 23 La. An. 290; *Calhoun v. Crossgrove*, 33 La. An. 1001. See also, as to the marital rights of a surviving

wife in this connection, *Succession of Piffet*, 39 La. An. 556, 564.

² *Earnest v. Earnest*, 5 Rawle, 213, 218; *Martin v. Martin*, 56 Ohio St. 333.

³ As, for instance, in Pennsylvania: *McConkey v. McConkey*, 9 Watts, 352. The authorities on this question, whether the issue of a predeceased legatee, who by statute take the legatee's lapsed legacy, are to be considered as taking directly from the testator, or as representing the deceased legatee, are not in entire harmony: see on this point *post*, § 435, p. * 940.

⁴ *Proctor v. Newhall*, 17 Mass. 81, 93; *Hancock v. Hubbard*, 19 Pick. 167; *Dearborn v. Preston*, 7 Allen, 192, 195.

⁵ *Courtenay v. Williams*, 3 Hare, 539, 553, holding that the debt should be deducted although barred by the Statute of Limitations.

⁶ See cases cited *post*, § 564, where the subject of set-off to legacies and distributive shares is discussed.

⁷ *Post*, § 554.

Later classes pointed out by statute. grandmothers, uncles, and aunts in the next class, together with descendants by representation, or placing these in a postponed class, as the case may be;¹

but more generally * a mode of ascertaining the next of kin, [*151] in degrees more remote than that of brothers and sisters and their descendants, is pointed out, either by the statute,² or by referring to the rules of the common³ or the civil law,⁴ of which it is therefore necessary to take further notice.

Blackstone treats of consanguinity under two heads, the lineal and the collateral. Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other, as between the intestate and his father, grandfather, great-grandfather, and so upward in the ascending line; or between the intestate and his son, grandson, great-grandson, and so downward in the direct descending line. Every generation, either upward or downward, constitutes a different degree. This is the only natural way of reckoning the degrees in the direct line, and is common to the civil, canon, and common law.⁵ Collateral kindred descend from the same stock or ancestor, but not one from the other. The ancestor is the *stirps*, or root, the *stipes*, trunk or common stock, from which these relations are branched out. The method of computing the degrees of collateral kindred is the same at the common law as at the canon law, from which it has been adopted into the common law,⁶ and begins with the common ancestor, reckoning downward; in whatever degree the claimant is distant * from the ancestor common to [*152] him and the intestate, that is the degree in which they are

¹ So in Arkansas, Colorado, Florida, Georgia, Missouri, Rhode Island, Texas, Virginia, and West Virginia.

² Arkansas (but in cases not provided for by the statute the common law is to govern), California, Colorado, Florida, Georgia (*Wetter v. Habersham*, 60 Ga. 193), Iowa, Kansas, Kentucky, Louisiana, Maryland, Missouri, New York (in cases not provided for by statute the inheritance is to descend by the rules of the common law), Rhode Island (see *Pierce v. Pierce*, 14 R. I. 514), South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin.

³ Arkansas (in cases not provided for by statute), New York (same), North Carolina (as modified by the statute).

⁴ In Alabama, Connecticut, Delaware, Illinois, Indiana (although the enactment was omitted in late revisions, it is held still to be the law in this State: *Cloud v. Bruce*, 61 Ind. 171, 173), Maine, Massa-

chusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire (*Kelsey v. Hardy*, 20 N. H. 479, 481, the statute being silent), New Jersey (as held in *Taylor v. Bray*, 32 N. J. L. 182, 191, and *Schenck v. Vail*, 24 N. J. Eq. 538, 542; but it is held in New Jersey that the rule of the common law, that inheritance cannot lineally ascend, has not been abolished, though modified to the extent of letting in the father and mother: *Taylor v. Bray*, *supra*, p. 186; the great-uncle and cousin of an intestate are of equal consanguinity, and both inherit equally: *Smith v. Gaines*, 36 N. J. Eq. 297), Ohio (as held in *Clayton v. Drake*, 17 Oh. St. 367, 371), Oregon, and Vermont.

⁵ 2 Bla. Comm. 202, and authorities.

⁶ This assertion has been doubted: see *Beasley, C. J.*, in *Schenck v. Vail*, 24 N. J. Eq. 538, 550, who suggests that the authority vouched by Blackstone does not sustain him in this dogma.

related.¹ But if there are more degrees between the intestate and the ancestor than between the ancestor and the claimant, then the degrees are reckoned between the intestate and the ancestor; or, in other words, in counting upward from the intestate to the ancestor, and downward from the ancestor to the heir, the longer of these two lines indicates the degree of consanguinity.

The civilians count upward from the intestate to the common ancestor, and from him downward to the heir, reckoning one degree for each step taken, adding the degrees in the ascending line to those in the descending line, and the sum indicates the degree of consanguinity between the intestate and the person whose heirship is to be established.

Computation
according to
the civilians.

The different results obtained in adopting either of these two methods of computing the degrees of consanguinity is illustrated by Blackstone in tracing the kinship between King Richard III. and King Henry VII. of English history, their common ancestor being Edward III. From him (*abavus*) to Edmond, Duke of York, the *proavus* is one degree; to Richard, Earl of Cambridge, the *avus*, two; to Richard, Duke of York, the *pater*, three; to King Richard III., the intestate, four; and from King Edward III. to John of Gant is one degree; to John, Earl of Somerset, two; to John, Duke of Somerset, three; to Margaret, Countess of Richmond, four; to King Henry VII., five; "which last-mentioned prince, being the farthest removed from the common stock, gives the denomination to the degree of kindred in the canon and municipal law. Though, according to the computation of the civilians, . . . these two princes were related in the ninth degree; for from King Richard III. to Richard, Duke of York, is one degree; to Richard, Earl of Cambridge, two; to Edmond, Duke of York, three; to King Edward III., the common ancestor, four; to John of Gant, five; to John, Earl of Somerset, six; to John, Duke of Somerset, seven; to Margaret, Countess of Richmond, eight; to King Henry VII., nine."²

Illustration of
the difference
in computing.

Under these several methods of computation very different collateral relatives are placed in the same degree of propinquity; the grandfather's grandfather, for instance, is in the fourth degree [* 153] gree; * under the rules of the civil law, the grand-uncle, cousin-german, and grand-nephew are equally in the fourth degree; while according to the canon or common law, the great-grand-uncle, the grandfather's cousin, his cousin's son and grandson, the grand-uncle's great-grandson, the uncle's grandson, and the brother's great-grandson are all equally in the fourth degree. To avoid the division of an inheritance into unduly small fractions, and to simplify the rules of descent, the statutes mostly provide that, where two or more of the same degree of consanguinity claim as next

¹ 2 Bla. Comm. 206.

² 2 Bla. Comm. 207.

of kin, those who trace their blood through the nearest lineal ancestor shall be preferred to those whose ancestor is more remote from the intestate.¹

§ 73. **Devolution of Ancestral Estates.** — It has already been noticed, in connection with the relative rights of brothers and sisters of the whole and of the half blood,² that some of the States distinguish, in the devolution of property, between that which has been acquired by the intestate himself, and such as he may have inherited or acquired by gift or devise from some ancestor or person from whom the estate is derived. The inheritance is directed to pass, in such cases, to lineal and collateral heirs of the blood of such ancestor, in Alabama,³ Arkansas,⁴ Connecticut,⁵ Indiana,⁶ Maryland,⁷ Michigan,⁸ Nebraska,⁹ Nevada,¹⁰ New Jersey,¹¹ New York,¹² Ohio,¹³ Pennsylvania,¹⁴ Rhode Island,¹⁵ Tennessee,¹⁶ Utah,¹⁷ and Wisconsin,¹⁸ and probably other States.

The term "ancestor" used in these statutes is not to be understood as applicable only to progenitors in the usual acceptation, * but in its technical significance, one from whom an [* 154] estate came directly — not mediately — to the intestate by

gift, devise, or descent;¹⁹ so that in this sense the husband may be his wife's ancestor.²⁰ It is the correlative to the term "heir,"²¹ the "*commune vinculum*," as Duncan, J., expressed it,²² "whether the estate ascends or descends."

¹ So in Arkansas, California, Colorado, Delaware, Florida, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New York, Oregon, Rhode Island, Virginia, West Virginia, and Wisconsin. It will be noticed that, where representation is allowed, the same result is reached by that means, differing only, perhaps, in respect of the privity between the persons representing and those represented, which is an incident to representation. See *ante*, § 71, and authorities.

² *Ante*, § 70.

³ Code, 1896, § 1457. See Stallworth v. Stallworth, 29 Ala. 76, 80; Eatman v. Eatman, 83 Ala. 478.

⁴ Dig. of St. 1894, § 2481; Beard v. Mosely, 30 Ark. 517, citing other Arkansas cases.

⁵ Gen. St. 1887, § 632; Clark's Appeal, 5 Conn. 207.

⁶ Ann. St. Ind. 1894, § 2626.

⁷ Publ. Gen. L. Md., art. 46, §§ 3 et seq.; Garner v. Wood, 71 Md. 37.

⁸ How. St. 1882, § 5776 a, p. 1505.

⁹ Cons. St. Neb. 1893, § 1127.

¹⁰ Gen. St. Nev. 1885, § 2984.

¹¹ Rev. St. N. J. 1895, p. 1194, § 5; Speer v. Miller, 37 N. J. Eq. 492; Miller v. Speer, 38 N. J. Eq. 567.

¹² 2 Banks & Bro. (1896, 9th ed.) pp. 1825 et seq.

¹³ 2 Bates' Ann. St. 1897, § 4158; Stannard v. Case, 40 Oh. St. 211.

¹⁴ Pepper & L. Dig. p. 2413, § 11; Pirot's Appeal, 102 Pa. St. 235; Henszy v. Gross, 185 Pa. St. 353.

¹⁵ Gen. L. 1896, p. 734, § 6.

¹⁶ Code, 1884, § 3269.

¹⁷ Amy v. Amy, 12 Utah, 278, 334.

¹⁸ Shuman v. Shuman, 80 Wis. 479.

¹⁹ Buckingham v. Jacques, 37 Conn. 402, 404.

²⁰ Cornett v. Hough, 136 Ind. 387, 391.

²¹ Cent. Dict.; Webster; Abb. L. Dict.

²² In Bevan v. Taylor, 7 Serg. & R., 397, 404, quoted in Lewis v. Gorman, 5 Pa. St. 164, 166.

From its nature personal property cannot always be traced back to an ancestor; hence it is held, in the absence of statutory provision on the point, that the rule affecting ancestral property is applicable only to real estate.¹

The term "ancestral estate" usually applies to real estate.

It is also to be noted, that the distinction between the devolution of ancestral and other estate is not usually construed as diverting the descent of an ancestral inheritance from the *nearest of kin*, but only from those not of the ancestor's blood who are in the same degree of kinship with others who are of the ancestor's blood.² Thus, if the statute classifies the heirs by designation of relationship, and not by computation of degrees of kindred, computation can be resorted to only if no persons are found to answer to the designation of the statute.³ And where a statute directs ancestral estate of a descendant who leaves brothers or sisters of the paternal as well as of the maternal side, to go to the half brothers and sisters of the line from which the estate descended, until such line shall be exhausted, the half brothers and sisters of the other line will be let in, if there be no brothers or sisters of the whole or half blood of the side of the parent from whom the inheritance came, to the exclusion of remoter kin of the ancestor's blood.⁴ On the same ground, next of kin of the whole blood *of the intestate* take his ancestral as well as other estate in equal shares, whether of the blood of such ancestor or not, under a statute directing the estate to pass to the next of kin (held to mean the next of kin of the intestate) *unless* the inheritance came by descent, devise, or gift from an ancestor, in which case all those who are not of the blood of such ancestor must be excluded.⁵

Ancestral estate not diverted from next of kin.

Another restriction, put upon those statutes in a similar course of

¹ *Henderson v. Sherman*, 47 Mich. 267, 274; *Jenks v. Trowbridge*, 48 Mich. 94; *Kelly v. McGuire*, 15 Ark. 555, 594; *Estate of Kirkendall*, 43 Wis. 167, 175; *Shuman v. Shuman*, 80 Wis. 479. But this rule may be changed by statute, as it is, it seems, in Connecticut: *Clarke's Appeal*, 58 Conn. 207 (followed, as announcing the law of Connecticut, in *Welles's Estate*, 161 Pa. St. 218, 224); see also *Rountree v. Pursell*, 11 Ind. App. 522, 544.

² *Ryan v. Andrews*, 21 Mich. 229, 234.

³ "It is obvious," says Cooley, J., in *Rowley v. Stray*, 32 Mich. 70, 74, "that when under the statute an estate passes to designated relatives, it does so because of the particular relationship, and not because the persons who take are of kin to the intestate within any certain degree, meas-

ured by some arbitrary standard or mode of computation. . . . One's child is no nearer of kin to him than his mother, though by the statute he is two degrees nearer in the line of descent; and the same may be said of a grandparent as compared with a brother or sister. . . . It is only when all the preferred classes fail that a computation of degrees of kindred becomes necessary."

⁴ *Nesbit v. Bryan*, 1 Swan, 468; *Chaney v. Barker*, 3 Baxt. 424.

⁵ *In re Pearsons*, 110 Cal. 524. The property in this case came from the intestate's mother, and was divided among the brothers and sisters of the intestate's mother and the sisters of the intestate's father. To the same effect: *Robertson v. Burrell*, 40 Ind. 328.

reasoning confines their application to estates descended from the immediate ancestor of the intestate, unless something in the language or context conditions a reference to one more remote.¹ The rule is the same in respect of property devised² or given.³ The course of descent, in determining whether an estate is ancestral or not, is controlled by the legal title,⁴ that title under which the intestate immediately held,⁵ and the statutes are to be construed upon legal rather than equitable principles.⁶

§ 74. **Posthumous Children.**—Posthumous children, born within the usual period of gestation after the death of the intestate, are entitled to inherit from an intestate father in the same manner as if they were born during his lifetime and had survived him.⁷ This rule is said to be the same under the common and the civil law,⁸ and is

* based upon the principle that a child *in ventre* [* 155] *sa mere* is *in rerum natura*, as much so as if born in the father's lifetime,⁹ and is so considered for all purposes which are for his benefit.¹⁰ But while the rule is recognized in all the States in favor of the intestate's own children, being affirmatively enacted by statute in most of them,¹¹ it is in some of them limited to the intestate's children, and no other persons not in being before the intestate's death are allowed to participate in his estate by inheritance.¹²

The ordinary period of gestation is fixed by medical writers at ten

¹ Gardner v. Collins, 2 Pet. 58, 91, 94; Clark v. Shailer, 46 Conn. 119, 121; Curren v. Taylor, 19 Ohio, 36; Morris v. Potter, 10 R. I. 58, 70; Wheeler v. Cluttbuck, 52 N. Y. 67, 70; Amy v. Amy, 12 Utah, 278, 335, with authorities *pro* and *con*.

² West v. Williams, 15 Ark. 682, 693; White v. White, 19 Oh. St. 531.

³ Oliver v. Vance, 34 Ark. 564, 568; Brewster v. Benedict, 14 Ohio, 368, 385.

⁴ Patterson v. Lamson, 45 Oh. St. 77; Shepard v. Taylor, 15 R. I. 204; s. c. 16 R. I. 166, 178.

⁵ Brower v. Hunt, 18 Oh. St. 311, 342.

⁶ Arrington v. Arrington, 28 Ind. 74, 76; Patterson v. Lamson, *supra*.

⁷ 4 Kent Comm. 412, adding that such is the universal rule in this country. But the rule is universal only as stated in the text; namely, between the intestate and his own children. See *infra*, as to the States distinguishing between the intestate's children and other heirs.

⁸ 1 Bla. Comm. 130, quoting the civil-law maxim, *Qui in utero sunt, in jure civili intelliguntur in rerum natura esse, cum de eorum commodo agatur*.

⁹ Wallis v. Hodson, 2 Atk. 116; Morrow v. Scott, 7 Ga. 535, 537; Hill v. Moore, 1 Murph. 233, 251.

¹⁰ Doe v. Clarke, 2 H. Blackst. 399, 401; Hall v. Hancock, 15 Pick. 255, 258; Morrow v. Scott, 7 Ga. 535.

¹¹ In California, Delaware, Georgia, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Virginia, West Virginia, and Wisconsin.

¹² Shriver v. State, 65 Md. 278, 283. In Alabama, Arkansas, Colorado, Florida, Missouri, Ohio, Rhode Island, Texas, and perhaps other States, the statute expressly inhibits inheritance by posthumous children other than those of the intestate.

lunar months; but there are many well-authenticated cases in which it was extended much longer.¹ It is in some States fixed by statute at ten months, during which the legitimacy of the issue is presumed.

Ten months the ordinary period of gestation.

Questions sometimes arise in respect of the validity of the disposition of property in which a child is interested, after the father's death and before its birth. It is held that a disposition made of the property for its preservation or protection will be binding upon the child, although it was not represented in the proceeding for the conversion, because the posthumous child did not possess, until born, any such estate in the property as could affect the power of the court to convert it if necessary.² Parties in being, possessing an estate of inheritance, are regarded as so far representing all persons who, being afterward born, may have interests in the same, that a decree binding them will also bind the after-born parties;³ and that a court of equity may bar, by its decree for sale, the interest of unborn contingent remaindermen, who, of course, could not be made parties.⁴ But a sale of the real estate before the birth of a [* 156] * posthumous child does not deprive it of its interest in such land.⁵ In a number of States the statute provides that "posthumous children are considered as living at the death of their parents."⁶

Disposition of property after father's death and before birth of child.

§ 75. **Illegitimate Children.** — According to the common law an illegitimate child is *filius nullius*, and can have no father known to the law;⁷ he has no inheritable blood, and can therefore be the heir to neither his putative father nor mother, nor any one else, and can have no heir but of his own body.⁸ The rigor, not to say cruelty of the civil law, which denied even maintenance to the fruit of incestuous intercourse,⁹ and of the common law, allowing a bastard no

Illegitimate child has no inheritable blood at common law.

¹ Wharton & Stillé Md. Jurispr., §§ 41 et seq.

² Knotts v. Stearns, 91 U. S. 638.

³ Ib., referring to the case of Faulkner v. Davis, 18 Gratt. 651.

⁴ Bofil v. Fisher, 3 Rich. Eq. 1. As to the doctrine of representation of persons not *in esse* by living parties in interest, see Woerner on Guardianship, § 75, p. 249.

⁵ Pearson v. Carlton, 18 S. C. 47.

⁶ Catholic Association v. Firnane, 50 Mich. 82, 85.

⁷ Taney, Ch. J., in Brewer v. Blougher, 14 Pet. 178, 198.

⁸ 1 Bla. Comm. 459; 2 Kent Comm. 212; Schoul. Dom. Rel. § 277, quoting

from Blackstone: "And really," says Blackstone, with warmth, as if to atone for a long and fallacious argument against legitimation by subsequent marriage, "any other distinction but that of not inheriting, which civil policy renders necessary, would, with regard to the innocent offspring of his parents' crimes, be odious, unjust, and cruel to the last degree;" and then adds: "And so might the commentator of the commentaries stigmatize the efforts of those who have nothing better to urge against human rights than the importance of preserving the symmetry of the law unimpaired."

⁹ 1 Bla. Comm. 458.

The severity of this rule relaxed in the United States.

rights but such as he himself acquires,¹ and renders legitimation impossible, although the parents marry after birth,² has been much relaxed in the several States of the Union.³ Thus they are almost univer-

sally allowed to inherit from the mother and through the mother;⁴ and in Connecticut, where the *statute gives the [*157] estate to the "children" of an intestate, without in any way qualifying the word, it has been held that illegitimate children were

Bastards inherit if acknowledged by the father.

thereby included.⁵ In some of the States the illegitimate offspring may also be enabled to inherit from the father, if the latter acknowledge him in writing in the presence of a competent witness;⁶ and the subsequent

¹ Even his name must be acquired by reputation: Co. Litt. 3.

² 1 Bl. Comm. 454.

³ Woerner on Guardianship, § 12.

⁴ So by positive enactment in Alabama, Arkansas, California, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey (if she leave no lawful issue), New York (in default of legitimate issue), North Carolina (if no legitimate issue, and cannot represent the mother), Ohio, Oregon (but does not represent the mother), Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wisconsin.

In Massachusetts the law constituting illegitimate children heirs of the mother and of any "maternal ancestor" is strictly construed; the term "ancestor" is construed to mean progenitor, and it is consequently held that neither a bastard nor his issue can take from the mother's collateral kindred: *Pratt v. Atwood*, 108 Mass. 40; nor they through her: *Haraden v. Larrabee*, 113 Mass. 430, 432. In Rhode Island illegitimates are put upon the same footing with legitimates as to the mother: *Briggs v. Greene*, 10 R. I. 495, 497. To same effect: *Burlington v. Fosby*, 6 Vt. 83, 88; *Garland v. Harrison*, 8 Leigh, 368, 370; *Bales v. Elder*, 118 Ill. 436; *Jenkins v. Drane*, 121 Ill. 217. — In Illinois the statute confers upon illegitimates and their lawful issue inheritable blood, as respects the mother and any maternal ancestor, or other person from whom the mother might inherit if living: *Elder v. Bales*, 127 Ill. 425. In Kentucky

it is held that the lawful children of a deceased bastard inherit from the bastard brother of such parent by the same mother, although such bastard brother died before the death of the parent: *Sutton v. Sutton*, 87 Ky. 216. The mother being dead, her collateral kindred cannot inherit from the bastard: *Croan v. Phelps*, 94 Ky. 213, holding that the widow takes all in such case. A bastard is incapable of inheriting from or transmitting to a legitimate child of his putative father: *Blankenship v. Ross*, 95 Ky. 306 (holding the mother and bastard brother to be sole heirs, though the estate was devised by devise from the putative's father, and the deceased died an infant). In Florida bastards are legitimate only so far as the mother is concerned; they cannot inherit from collateral kindred upon the mother's side: *Williams v. Kimball*, 35 Fla. 49. In Maine in certain circumstances the bastard may inherit from the lineal or collateral kindred of father or mother (since 1887): *Misser v. Jones*, 88 Me. 349.

⁵ *Heath v. White*, 5 Conn. 228, 232; *Dickinson's Appeal*, 42 Conn. 491, 504, *et seq.*, holding that bastards have inheritable blood to transfer collaterally as well as lineally; *Brown v. Dye*, 2 Root, 280, deciding that illegitimate children of the same mother may inherit from each other. But the word "children" in the statute of Illinois was held to mean lawful children, and not to do away with the common-law rule, according to which illegitimate children cannot inherit: *Blacklaws v. Milne*, 82 Ill. 505; *Orthwein v. Thomas*, 127 Ill. 554. See, however, *Rogers v. Weller*, 5 Biss. 166, 168, 170.

⁶ So provided in California, Iowa (if

marriage of the parents legitimates their issue, if acknowledged by the father, in nearly all the States, cancelling all distinction between such children and those begotten and born in lawful wedlock.¹ If an illegitimate child is once legitimated by the subsequent marriage of the parents in a State whose laws attach such effect to such marriage, the legitimacy follows the child everywhere, and entitles him to the right of inheritance.²

Marriage of
parents legiti-
mates bastard.

In some of the States, illegitimate children take as heirs from father or mother, if there are no other heirs capable of

taking, so that they exclude the State only.³

Inherit in de-
fault of other
heirs.

[* 158] The * word "heirs" in such case is not confined to children; it includes all who may inherit under the law.⁴

It is also to be observed, that in some States the issue of marriages which are null in law are in every respect legitimate, and inherit and transmit by descent as if born in lawful wedlock.⁵

the paternity be notoriously acknowledged, or acknowledged in writing, or proved during the intestate's lifetime: as to evidence sufficient to establish notorious recognition, see *Blair v. Howell*, 68 Iowa, 619; Maine, Michigan (the acknowledgment must be recorded like a deed), Minnesota, Nebraska, Nevada, Tennessee, Vermont, and Wisconsin.

The statute of Vermont, legitimating a bastard adopted by the putative father "as respects the father," is held not to enable such bastard to inherit by representing him: *Safford v. Houghton*, 48 Vt. 236, 238. In Iowa the acknowledgment need not be by formal avowal, it may be by letters recognizing him as a child: *Crane v. Crane*, 31 Iowa, 296, 303; and so in California: *Blythe v. Ayres*, 96 Cal. 532 (holding that the statute requiring acknowledgment in writing, in presence of a competent witness, was complied with by letters written in the presence of a competent witness, who does not sign as an attesting witness): 582; and in Iowa the birth of an illegitimate child after making a will, if acknowledged by the father revokes such will: *Milburn v. Milburn*, 60 Iowa, 411. A bastard duly legitimized inherits not only lineally but also collaterally: *McKamie v. Baskerville*, 7 S. W. R. (Tenn.) 194.

¹ In Indiana, if a man marries a woman, although he then denies that a child, with which she is pregnant, is his own, as charged by her, and afterward

cohabit with her, the child is nevertheless his legitimate heir: *Bailey v. Boyd*, 59 Ind. 292, 298. See also *Blythe v. Ayres*, 96 Cal. 522, holding a child legitimated by the law of California, where the father was domiciled, though neither the child nor its mother had ever been in the United States until after the father's decease. In Kentucky it is held that the statute does not apply, where a married man has children by a woman not his wife, and afterwards marries her, the first marriage tie having been severed: *Sams v. Sams*, 85 Ky. 396.

² *Miller v. Miller*, 91 N. Y. 315; *Smith v. Kelly*, 23 Miss. 167; *Scott v. Key*, 11 La. An. 232; *Ross v. Ross*, 129 Mass. 243; *Van Voorhis v. Brintnall*, 86 N. Y. 18; *Goodman's Trust*, L. R. 17 Ch. Div. 266. But see *Lingen v. Lingen*, 45 Ala. 410. Also *Woerner on Guardianship*, § 12.

³ As in Indiana, where an illegitimate child inherits from and through the mother as if born in lawful wedlock: *Parks v. Kimes*, 100 Ind. 148, 153; and from the father in default of legitimate children, if there be no heirs within the United States capable of taking; Louisiana, where natural children take in default of lawful descendants, ascendants, collateral kindred, and husband or wife.

⁴ *Borroughs v. Adams*, 78 Ind. 160.

⁵ *Green v. Green*, 126 Mo. 17; *Dyer v. Brannock*, 66 Mo. 391, 418; *Harris v. Harris*, 85 Ky. 49; and this although the

In States recognizing neither lawful marriages nor property rights in slaves, the laws of descent did not, of course, apply to them.

Legitimacy of slaves. A statute passed after their emancipation, declaring that children of colored parents born before a day named of persons living together as man and wife should be legitimate children, with all the rights of heirs at law and next of kin with respect to the estate of such parents, was held, in North Carolina, as entitling them to inherit from such parents only, but not from any other person.¹ So in Florida, where the slave marriage terminated before, or was never recognized by the parties after, they became free persons, the offspring thereof have no inheritable blood, and they can inherit no property acquired by their ancestors after emancipation.² And in Tennessee the right of direct inheritance only, and not the right of collateral inheritance, is conferred by such an act.³

Upon the death of a bastard intestate, his descendants take as if he were legitimate. In most States his mother, in default of descendants, and those tracing kinship through her, inherit from him.⁴ Where the statute declares that illegitimate children shall be deemed legitimate as between themselves and their representatives, and that their estates shall descend accordingly in the same manner as if they had been born in wedlock, and, in case of death without issue, to such person as would inherit if all such children were born in wedlock, it is held that the estate of such illegitimate dying intestate without issue shall descend to his or her brothers and sisters born of the body of the same mother, and their representatives, whether legitimate or illegitimate.⁵

In Illinois, by act of April 9, 1872, "in case of the death of an illegitimate intestate leaving no child or descendant of a child, the whole estate, personal and real, shall descend to and absolutely vest in the widow or surviving husband."⁶ The widow might, under the administration law, renounce the will, and take as if *the husband had died intestate.⁷ Under these statutes it [* 159] was held that the widow of an illegitimate testator, renouncing the will, took the testator's entire estate, thus putting it in her power to render her husband's will nugatory.⁸

marriage was contracted elsewhere: *Leonard v. Broswell*, 99 Ky. 528.

¹ *Tucker v. Bellamy*, 98 N. C. 31.

² *Williams v. Kimball*, 35 Fla. 49.

³ *Shepherd v. Carlin*, 99 Tenn. 64.

⁴ So in Alabama, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Rhode

Island, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin, and probably other States.

⁵ *Powers v. Kite*, 83 N. C. 156, citing former North Carolina cases. See, to similar effect, *Southgate v. Annan*, 31 Md. 113, 115; *Estate of Magee*, 63 Cal. 414.

⁶ Pub. L. Ill. 1871-72, p. 353, § 2, pl. 3.

⁷ Pub. L. Ill. 1871-72, p. 97, § 78 (since repealed).

⁸ *Evans v. Price*, 118 Ill. 593. This

§ 76. **Descent from, to, or through Aliens.**—It is evident that the descent of real estate from, to, or through aliens is affected by the question of alienism to the extent only in which an alien is capable or incapable of owning real estate under the law of the country or State in which it is situated. It is mentioned, in connection with the testamentary capacity of aliens,¹ that public policy requires that no alien, whether friend or enemy, shall have title to lands as against the sovereignty; though, at the common law, an alien may acquire by purchase (including devise), and even bring an action for lands, and hold them, until the government, on principles of policy, interfere and, by office found, deprive him of his title,² or until his death, when, as an alien can have no heirs, it escheats.³ The common-law incompetency of aliens to transmit real estate by descent is fatal to the title of any one who claims by descent through an ancestor who was an alien, no matter how remote. The statute of William III.,⁴ which is in force in several of the United States, enacted to cure this disability, did not go to the extent of enabling title to be deduced by descent from a remote through an alien ancestor still living.⁵ It is said to be a well-settled principle of the common law, however, though militating against the view of Lord Coke, that the descent between brothers, or between brother and sister, is immediate, and that the alienage of the father does not impede the descent between his children;⁶ but that a grandson cannot inherit to his grandfather, though both were natural-born subjects, if the intermediate son was an alien; a distinction in the law, which, says Kent, "would admit one brother to succeed as heir to the other, though their father be an alien, and yet not admit a son to inherit from his grandfather, because his father was an alien, is very subtle."⁷

The doctrine announced in the case of *Collingwood v. Pace*,⁸ is generally followed in the United States, so far as it is not controlled by statute, to the extent of declaring descent from a brother to be immediate, not depending on the fact whether the parents at the

construction was denied by the minority of the court (the judges standing four to three), on the ground among others, that it involves an unwarrantable exercise of power by the legislature, and is therefore obnoxious to the constitution: *Evans v. Price*, dissenting opinion, 118 Ill. 663.

¹ *Ante*, § 19.

² 2 Kent, 53; *Jackson v. Lunn*, 3 Johns. Cas. 109, 112; *Johnson v. Hart*, 3 Johns. Cas. 322, 325.

³ As to escheat, see *post*, §§ 131 *et seq.*

⁴ 11 & 12 Wm. III. c. 6.

⁵ *McCreery v. Somerville*, 9 Wheat. 354, 355.

⁶ On the ground maintained by Lord Hale, in *Collingwood v. Pace*, that the father, although a *medium differens sanguinis*, is not a *medium differens hæreditatis*, and that alienism in the latter line only impedes the descent: *per Pratt, J.*, in *McGregor v. Comstock*, 3 N. Y. 408, 411; *Luhrs v. Eimer*, 80 N. Y. 171, 179. Kent, in his Commentaries, says that Lord Hale's opinion is rendered "somewhat perplexing and obscure by the subtlety of his distinctions and the very artificial texture of his argument": 2 Kent, 55.

⁷ 2 Kent, 55, 56.

⁸ 1 Vent. 413.

time of their decease were capable of holding or transmitting the estate or not, because the estate was not vested in them;¹ it is even, in some cases, carried to its logical result and applied wherever the heir is entitled under the statute in virtue of his own kinship to the decedent, in which case the parent or other intermediate ancestor might be a necessary link to establish the consanguinity, — the *medium differens sanguinis* suggested by Lord Hale, whose status as alien or citizen is entirely indifferent to the title of the heir, — contrasted with the claim of one dependent upon representation of some ancestor — *medium differens hereditatis* — whose incapacity would be fatal to the claimant's title.² In some cases, however, descent between cousins and more remote kindred is held to be mediate, and the alienism of an intermediate ancestor to impede the course of descent.³

The fluctuations of the law, giving place both in England and America to a more liberal policy in respect of the rights of aliens to acquire, hold, and transmit property, and subsequently undergoing a reaction in the United States in the direction of restricting such rights has been discussed in treating of the testamentary capacity of aliens, to which the reader is referred, to avoid unnecessary repetition.⁴ But it is still the law, in the greater number of the States at least, that alienism constitutes no absolute bar to the right of inheritance, nor is the alienism of an ancestor allowed to impair the title of a claimant to real estate,⁵ though recent legislation in some of them tends to the restoration of the common-law rule.⁶

¹ Wilcke v. Wilcke, 102 Iowa, 173; through an alien; Levy v. McCartee, 6 Pet. McGregor v. Comstock, 3 N. Y. 408; 102; Furenes v. Mickelson, 86 Iowa, 508. Luhrs v. Eimer, 80 N. Y. 171, 179.

⁴ Ante, § 19.

² Lash v. Lash, 57 Iowa, 88; McGregor v. Comstock, supra; Luhrs v. Eimer, supra.

³ Jackson v. Green, 7 Wend. 333 (before the incorporation of the statute of Wm. III., into the New York law of descent); Beavan v. Went, 155 Ill. 592, 600, holding that a citizen cannot inherit from or

⁵ Campbell's Appeal, 64 Conn. 277, 292, holding that the common-law rule of excluding from the inheritance all who trace their descent through uninheritable blood was never in force in Connecticut.

⁶ Beavan v. Went, 155 Ill. 592, 602, two judges dissenting.

[* 160]

* CHAPTER IX.

PROVISIONAL ALIMONY OF THE FAMILY.

§ 77. **Nature and Office of Statutory Allowances for the Provisional Support of the Family.** — It has already been noticed that the power of testamentary disposition is limited, in some respects, by the policy of the law,¹ which places certain rights beyond the caprice of a testator. One of these is the right of the surviving members of his family to the necessary means of subsistence, raiment, and shelter during the period immediately succeeding his death, which the law enforces not only against any inconsistent testamentary disposition, but equally against creditors, heirs, and distributees, whose rights, like those of legatees, are controlled by and postponed to the provisions made for the surviving family in this respect.

Paramount right of surviving family to temporary alimony.

These provisions, like the kindred subject of the homestead exemption laws, are of purely American origin. They owe their existence to a humane and benevolent consideration of the distress and helplessness of widows and orphans newly bereft of their protector and supporter, and to a wise public policy, recognizing the true relation of the State to the Family as its organic, constituent element. "The protection of *the Family*," says Thompson in his valuable work on Homesteads and Exemptions, "from dependence and want is the expressed object of nearly all the homestead and exemption laws; the immunities enacted by these statutes are extended to this association of persons, or to the head thereof, for the benefit of all its members."² "The relation of husband and wife, parent and child, is the unit of civilization, and the State has thought to encourage that relation by protecting it from absolute want, arising from the vicissitudes of life."³

Protection of the Family a necessity of the State.

The common law secures to the widow her dower, and to the widow and children their *pars rationabilis* (corresponding to [* 161] *dower and distribution under American statutes), but no provision whatever is therein found to meet the exigencies arising immediately upon the death of the head of a family, save, perhaps, the clause in

No such provision at common law.

¹ *Ante*, §§ 6 *et seq.*; § 17.

² *Thomp. Homest. & Ex.*, § 40.

³ *Bond, J., In re Lambson*, 2 Hughes, 233.

Magna Charta securing to the widow the right to remain in her husband's capital mansion for forty days after his death, within which time her dower was to be assigned.¹ These rights are secured to the widow to an equal extent in all the States, aside from the subject now under consideration, and in addition to the exemption from execution of certain property necessary to the family during the lifetime of the husband, and which are in many instances continued in favor of the widow or minor children upon his death.²

These provisions for the protection of the family constitute no gift to the widow to repair any seeming injustice in the Statute or Distribution or the will of her husband, but are intended to furnish to her and her minor children the means of temporary maintenance out of the estate of the deceased husband until their interest therein can be set out to them,³ not only protecting so much against the claims of creditors,⁴ but also against the heirs, or distributees, legatees, and personal representatives. Depending wholly upon the enactments of the several legislatures, they vary greatly, not only in magnitude, but also as to the mode in which this bounty is secured to them; intended, in some cases, "merely to furnish the family with a reasonable maintenance for a few weeks, and with some articles of necessary furniture when not otherwise provided with them, . . . temporary in its nature and personal in its character, conferring no absolute or contingent right of property which can survive her or go to her personal representatives;"⁵ in others, assuming such liberal proportions as *not only to effectually protect a family against sudden [*162] impoverishment by reason of the death of its natural provider, but seriously affecting the interests of creditors.⁶ In Missouri

¹ Thomp. Homest. & Ex., § 933; Hubbard v. Wood, 15 N. H. 74, 78.

² As by express enactment in California, Colorado, Kansas, Mississippi, Nevada, Oregon, Rhode Island, Virginia, and perhaps other States. But in so far as these exemptions extend to the head of a family, they protect the widow and minor children in all of them.

³ Foster v. Foster, 36 N. H. 437, 438; Woodbury v. Woodbury, 58 N. H. 44; Pulling v. Durfee, 85 Mich. 34; Baker's Appeal, 56 Conn. 586, 588; says Searles, J., *In re Walkerley*, 77 Cal. 642, 645, "instead of requiring the widow and children of deceased persons, who have estates and homes, to dwell in the open air, to subsist upon meat which they cannot obtain, and drink which they cannot reach, the law humanely provides that they may

remain in the homestead, retain the furniture and utensils exempt from execution, and have a support from the estate commensurate with their circumstances and necessities, until such time as they can come into the estate."

⁴ Post, § 83. In Connecticut, whose statutes expressly authorize creditors to intercept legacies, distributive shares, and debts payable out of the estate of a deceased person by garnishment process, it is held that the allowance to the widow cannot be so attached: Barnum v. Boughton, 55 Conn. 117. See also the case of Livingston v. Langley, 3 S. E. R. (Ga.) 909, giving the widow preference to a fund claimed by her husband's sureties.

⁵ Adams v. Adams, 10 Met. (Mass.) 170, 171.

⁶ In California, Kansas, Missouri, and

the property so allowed vests in the widow or children immediately upon the death of the husband or father, without formal election,¹ may be assigned by the widow by deed with or without consideration,² and passes to her administrator, as against the heirs or husband's creditors.³ By a recent statute the widower of a deceased wife who dies intestate, owning personal property in her own name, is entitled to the same remedies and reliefs in her estate as a widow is in her husband's estate.⁴ These statutory provisions do not form part of the widow's distributive share as next of kin, unless so expressed by the statute.⁵

§ 78. **Statutory Provisions touching the Extent and Mode of the Allowance.** — In some of the States, the *quantum* of the allowance is not fixed by statute, but left to the discretion of the probate court. In California⁶ and Nevada⁷ the probate judge is required to make a temporary allowance

Temporary allowance before grant of letters.

for the reasonable support of the widow and minor children before the grant of letters; and upon the return of the inventory, or subsequently, he is to set apart for the use of the family all personal property which is by law exempt from execution or attachment against a debtor; and if this is not sufficient for the maintenance of the family, to make such additional reasonable allowance out of the estate as may be necessary during the progress of the settlement, — not longer, in case of insolvent estates, than one year. In Connecticut,⁸ Iowa,⁹ Maine,¹⁰ Massachusetts,¹¹ New Hampshire,¹² Texas,¹³ and Vermont,¹⁴ the entire amount to which the widow or minor children, or both, are

Allowance in discretion of probate court.

thus entitled, is determined by the judge of probate, except [* 163] that in all cases the wearing apparel,¹⁵ and generally * the

some other States, very generous provision is made for the surviving family. See *post*, § 78.

¹ *Hastings v. Meyer*, 21 Mo. 519.

² *McFarland v. Baze*, 24 Mo. 156.

³ *Cummings v. Cummings*, 51 Mo. 261, 263.

⁴ *Laws*, 1895, p. 35, § 110 *a*. Missouri seems to stand alone among the States in this respect.

⁵ Hence a bill of sale by the widow of "all the personal property owned by her as heir at law of her husband" does not include such allowance: *Estate of Moore*, 57 Cal. 446, 447. See somewhat similar decisions cited *post*, § 85, p. * 175, note.

⁶ *Civ. Proc.*, § 1464.

⁷ *Gen. St. Nev.*, 1885, § 2789.

⁸ *Gen. St.*, 1888, § 604. *Haven's Appeal*, 69 Conn. 684.

⁹ *Code*, 1897, § 3314

¹⁰ *Rev. St.*, 1883, p. 552, §§ 21 *et seq.*

¹¹ *Gen. St.*, 1882, ch. 135, §§ 1, 2, p. 770. In cases where there is no widow, but minor children, the allowance is limited not to exceed \$50 each.

¹² *Publ. St.*, 1891, ch. 195, § 1.

¹³ *Rev. St.*, 1888, § 1984

¹⁴ *Gen. St.*, 1880, § 2109.

¹⁵ What constitutes wearing apparel, or rather what does not constitute such, has been judicially decided in Vermont. Neither the watch, chain, key, and seals, nor the finger-ring usually worn by a person when living, nor the sword and sword-belt which an officer in the United States Navy wore in accordance with the regulations of the Navy Department, can be considered wearing apparel within the meaning of the statute securing the wearing apparel of a decedent to his widow: *Sawyer v. Sawyer*, 28 Vt. 249,

ornaments of the family, are reserved to the widow. In Michigan,¹ Nebraska,² North Carolina,³ Oregon,⁴ Rhode Island,⁵ and Wisconsin,⁶ this discretion of the court is limited to determine the amount necessary for sustenance, while other articles of personal property are secured to the widow or family expressly, or permitted to be selected by them. In Mississippi⁷ and Missouri⁸ the articles allowed as the absolute property of the widow are specifically enumerated, including provisions for the support of the family for one year; but if such provisions are not on hand, the probate court, or in Mississippi the commissioners appointed to set out the widow's share, are to make a reasonable appropriation out of the assets to supply the deficiency. In Virginia,⁹ the "dead victuals" are reserved for the use of the family if desired by any member thereof, and live stock may be killed for that purpose before the sale. In Georgia¹⁰ and Tennessee¹¹ commis-

Commissioners appointed to set apart a sufficiency for the support of the family.

sioners are appointed to set apart a sufficiency of the estate for the support of the widow and her family for twelve months, in property or money. In other States

the amount and specific articles of property allowed to the widow and family, and in several instances to the surviving husband and his minor children, are distinctly enumerated, varying in kind, amount, and nature of the title by which it is held. In Alabama¹² the statute allows certain articles enumerated absolutely, in addition to which the widow or guardian of infant heirs may select other property to the amount of one thousand dollars, which, however, if the estate is solvent, must be accounted for as so much received on account of distribution or legacy. In Pennsylvania the widow or children of any decedent are allowed to retain \$300 worth of assets of the estate; but this statute is held to be founded on the father's liability for the support of his * family, and does not [* 164] extend to the children of a woman deceased.¹³ In Maryland, prior to 1884, a widow was entitled to select property to the amount of \$150, out of any personal property inventoried; but by act of the

Redfield, C. J., dissenting except as to the watch. But otherwise of the epaulets, which are part of the coat, and a bosom pin, which is attached to the shirt, and must go with the principal (p. 252). Rings and jewelry are not wearing apparel: *Frazier v. Barnum*, 19 N. J. Eq. 316, 318.

¹ 2 How. St. 1882, § 5847.

² Cons. St. 1893, § 1235.

³ Code, 1883, p. 811, §§ 2116 *et seq.*

⁴ Code, 1887, § 1126. See as to the duty of the court on the filing of the inventory, *McAttee v. McAttee*, 23 Oreg. 469.

⁵ Gen. L. 1896, p. 725, § 4. As to the jurisdiction of the court in Rhode Island, see *Babcock v. Probate Court*, 18 R. I. 555.

⁶ 2 Comp. St. 1889, § 3935.

⁷ Ann. Code, 1892, § 1877.

⁸ Rev. St. 1889, § 105.

⁹ Code, 1887, § 2649.

¹⁰ Code, 1895, § 3465.

¹¹ Code, 1884, §§ 3125 *et seq.*

¹² Code, 1896, §§ 2072, 2073; *Hunter v. Law*, 68 Ala. 365, 367.

¹³ King's Appeal, 84 Pa. St. 345.

legislature her selection is now confined to the kitchen and household furniture.¹

§ 79. **Rules governing the Amount of the Allowance.** — In exercising the discretion vested in probate courts and in commissioners appointed by them to designate and set apart the property and money allowed for the provisional maintenance of the family, they are not to proceed in an arbitrary or capricious manner, setting up their own fanciful views or unsupported individual opinions as the criterion by which to measure the rights of the family on the one hand, and of creditors, heirs, or legatees on the other; but they exercise a sound judicial discretion, subject to be reviewed and corrected on appeal.² It is the duty of the appellate court in most States to hear and determine the question anew, and to make such allowance in lieu of the allowance made by the probate court as to it may appear reasonable and proper, as if constituting, *pro hac vice*, the probate court.³ Unless, however, the award made in the probate court be appealed from, it is conclusive, and cannot be questioned collaterally, however disproportionate it may seem or be.⁴ In some States no appeal is allowed from the order of allowance, on the ground that the object of the order is to serve an immediate necessity and might be defeated if appeal were allowable,⁵ or on the ground that the award is a ministerial act.⁶ And these orders and the amounts of the allowances being largely in the discretion of the probate court, the appellate courts will not interfere, unless it appear that such discretion has been improperly exercised.⁷

Discretion of probate court controlled by appellate courts.

Appeal not allowed.

Where the whole question as to the magnitude of the allowance, as well as the time during which it is to apply, is left undetermined by the statute, it should be remembered that the policy and intention of the law is to furnish a temporary supply for the wants of the family while the estate is in process of administration, until the debts are paid and the distributive shares of the widow and heirs are ascertained, or, in case of insolvency, to furnish support to the helpless until new arrangements can be made to enable them to gain a livelihood.⁸

[* 165] * In determining the amount necessary for such purpose,

¹ Crow v. Hubbard, 62 Md. 560.

² Piper v. Piper, 34 N. H. 563, 566; Applegate v. Cameron, 2 Bradf. 119.

³ Cummings v. Allen, 34 N. H. 194, 198; Gilman v. Gilman, 58 Me. 184, 191; Washburn v. Washburn, 10 Pick. 374.

⁴ Litchfield v. Cudworth, 15 Pick. 23; Boyden v. Ward, 38 Vt. 628; Drew v. Gorden, 13 Allen, 120; Richardson v. Merrill, 32 Vt. 27. In Iowa an allowance of \$800 was reduced to \$350 after the expiration of the year for which it was

made; but the appellate court ruled that, if the widow had expended the amount allowed, she could not be held to account for it: Harshman v. Slonaker, 53 Iowa, 467, 468.

⁵ Leach v. Leach, 51 Vt. 440.

⁶ Pope v. Hays, 30 Ga. 539.

⁷ *In re Lux*, 100 Cal. 593, 605; Power's Estate, 92 Mich. 106.

⁸ Washburn v. Washburn, *supra*; Dale v. Bank, 155 Mass. 141.

regard may be had to the state of the health, age, and habits of the widow, the number and age of the children immediately dependent upon her, as well as the value of the estate and of her dower and distributive share therein.¹ It may also be considered whether or not she is accustomed to hard labor, and thus enabled to support herself, or if by reason of ill health or other circumstances she is unable to do so. A smaller amount will be proper in the former case than that which may be necessary in the latter.² When the statute fixes the time for the duration of which the allowance is to be made, it must, of course, be sufficient to secure the reasonable comfort of the family during the whole of such period, if used with ordinary prudence and economy. If the estate is large, apparently solvent, and the allowance merely an anticipation of the widow's distributive share, a more liberal allowance will be justified than where it is small or insolvent; and what would be a reasonable allowance for one accustomed to privation and labor might be very unreasonable for one raised in affluence.³ The discretion of the probate judge has been held to include the power of refusing an allowance altogether, where the condition of the wife as to separate property of her own, or the amount of her distributive share in the estate, or what she may realize from her dower in the real estate, renders such an allowance unnecessary, or the more pressing necessities of the heirs or legatees would make it unjust.⁴ In several States, the statute expressly vests in the probate court the power to refuse an allowance altogether;⁵ but in some States, where *the statute [* 166] provides for such reasonable allowance as the probate court shall deem necessary, it is held that the discretion relates only to the *quantum* of the allowance, and that he cannot refuse it altogether.⁶

Considerations governing the allowance.

Comfort of the family to be secured.

Probate judge may refuse allowance.

¹ *Buffum v. Sparhawk*, 20 N. H. 81, 84; *Duncan v. Eaton*, 17 N. H. 441; *Mathes v. Bennett*, 21 N. H. 188; *Peet's Estate*, 79 Iowa, 185, 190.

² *Brown v. Hodgdon*, 31 Me. 65, 70; *Washburn v. Washburn*, 10 Pick. 374.

³ *Thompson on Homesteads*, § 948.

⁴ *Hollenbeck v. Pixley*, 3 Gray, 521, 524; *Kersey v. Bailey*, 52 Me. 198. But the ground upon which the *decision* in this case is based addresses itself rather to the question whether the applicant was really the widow of the decedent within the provisions of the statute, — a question very different from that of the proper exercise of a legal discretion. See also *Walker, Appellant*, 83 Me. 77.

⁵ So in Iowa, the allowance is only to

be made *if necessary*, and may when made be subsequently diminished or increased: Code, 1897, § 3314; in Michigan, if the provision made by a testator be insufficient: How. St. 1882, § 5814; in Nevada, if the widow have sufficient maintenance from her own property, the allowance is to be made in favor of minor children: Gen. St. 1885, § 2796. In Maine and New Hampshire, the allowance is likewise conditioned, that the testator make no adequate provision by will, or that the widow waive such provision, or applies to intestate or insolvent testate estates.

⁶ *Sawyer v. Sawyer*, 28 Vt. 245. In this case, an allowance of \$500 out of an estate to which the brother and sister of the intestate were heirs was affirmed to

It may not be superfluous to remark, in connection with the amount allowable to the widow, that this is generally determined by the law in force at the time of the husband's death, but that, as in similar collisions between the rights of creditors and others, the rights of creditors cannot be impaired by subsequent legislation; consequently, the surviving widow's claim is determined, as to the debts of the husband, by the law in force at the time they were contracted, and cannot be enlarged by later enactments.

§ 80. **To what Extent Liberality should govern the Court.**—

The tendency of courts has generally been to give full effect and realization to the humane and enlightened policy which dictated these enactments, by construing their provisions in the same spirit of liberality and consideration. Not so as to make them a cloak to cover up a substantial invasion of the rights of creditors, but so as to resolve all reasonably doubtful questions in favor of the widow and children.¹ Thus, where the statute extended this allowance to "the widow and children of any deceased person," it was held that the widow was entitled whether there were children or a child, or not;² and whether the testator bequeathed property to her in his will or not,³ and that the allowance may be a sum of money in lieu of articles of provision, although the testator may have left an ample supply of provisions for her use,⁴ and whether the estate is solvent or insolvent.⁵ Where the statute gave the right of election to a widow for whom a testator

Statutes construed with liberality.

had provided in his will, and a testator provided that "she [* 167] shall have her dower out of my estate in the * same manner she would be entitled to if this will had not been made," it was held that the widow had the right to claim the provision made for her by law, upon waiving her claim under the will.⁶ In construing a statute giving to the widow such beds, bedsteads, bedding, and household and kitchen furniture "as may be necessary for herself and family, and provisions for a year for herself and family," the court say: "It cannot be supposed that the legislature, when it used the words 'necessary furniture' and 'provisions for a year,' designed to use the words in a rigid and unbending sense, to be con-

a widow shown to be in possession of a pension of \$240 per annum from the United States, and living with a wealthy father, who would not, it was argued, charge her for her board. In *Bacon v. Probate Judge*, 100 Mich. 183, 189, the court says that the right to the year's allowance was vested and could not be withheld by the probate court, citing cases from Ohio and Georgia. See further on this point *post*, § 87.

³ *McReary v. Robinson*, 12 Sm. & M. 318.

⁴ *Nelson v. Smith*, 12 Sm. & M. 662. "It is intended as a humane provision for the widow and her children, when she is presumed to be left in a condition in which she is unable to provide for herself": *Turner v. Turner*, 30 Miss. 428, 431.

⁵ *Loury v. Herbert*, 25 Miss. 101. *Post*, § 83.

⁶ *Crane v. Crane*, 17 Pick. 422, 427.

¹ *Thompson on Homest.*, § 936.

² *Sawyer v. Sawyer*, 28 Vt. 245.

strued in all cases without reference to the circumstances of the parties. If that were so, we should be obliged to say that many articles of furniture to be found in all comfortable houses were not absolutely indispensable, and that the provisions for a year might be reduced to a certain amount of bacon and corn meal. . . . So, too, in regard to the word family. . . . We are of opinion that the legislature intended, by the word family, to include such persons as constituted the family of the deceased at the time of his death, whether servants or children who had attained their majority. . . . It was the design of the legislature to furnish the necessary sustenance for such household for one year after the death of the husband, and to enable the widow to keep what death had spared of her domestic circle unbroken during that time, notwithstanding the loss of her husband. This is the humane construction, and is most consistent with the kindly and liberal spirit which marks all our legislation in regard to widows.”¹

It has been held in New York, that this allowance is not limited to cases where the deceased was a resident of the State in which the assets are administered;² but the authorities are not unanimous.³ Expressions in the spirit indicating the desire of courts to give full effect to the liberal enactments of the legislature, are met with in numerous cases, although instances are not lacking * in which these laws have been construed with [*168] technical strictness. This subject is again referred to in connection with the separate property of the widow.⁴

§ 81. **Cases illustrative of the Amount of Allowance deemed Reasonable.** — It is obvious that, while statutes with respect to the widow's awards should be liberally construed, yet the allowances should be within the bounds of reason, and the construction given them should be reasonable.⁵ It may be of assistance to widows, executors, and administrators, and to attorneys and courts, to collate some of the cases illustrative of what appellate courts deem reasonable, and what unreasonable, allowances, in the method observed by Mr. Thompson, in his valuable Treatise on Homesteads and Exemptions.⁶ Thus it was held in a late Illinois case,⁶ that the court would not be justified in approving the report of commissioners showing on its face the attempt to force results, and to make up to

¹ *Strawn v. Strawn*, 53 Ill. 263, 274. See also *Sanderlin v. Sanderlin*, 1 Swan, 441; *Cheney v. Cheney*, 73 Ga. 66.

² *Kapp v. Public Administrator*, 2 Bradf. 258. Says the surrogate: “The benevolent design of the statute has a subject, whether the deceased was an inhabitant or not; and so long as the legislature have not confined the benefit of

this beneficent provision, it is hard to find any reason for narrowing the charities of the law by judicial interpretation”: p. 260 of the opinion.

³ *Post*, § 89.

⁴ *Post*, § 87.

⁵ *Boyer v. Boyer*, 21 Ill. App. 534, 537.

⁶ § 952.

the widow an amount not warranted by a proper valuation of the property allowed her by the statute. In this case the deceased left an estate in personalty of over \$135,000 in value; the commissioners appraised the personalty secured by statute to the widow at \$806.50, and estimated the amount to be allowed her at \$7,075, which award was rejected by the county court to whom the report was made; whereupon the widow, administratrix, appealed to the circuit court, and asked leave to substitute a new estimate of the commissioners, awarding her \$6,629, which the circuit court refused, and affirmed the action of the county court in rejecting the original report. On appeal to the appellate court, the action of the circuit was confirmed in both respects, on the ground that, whether the circuit had power to act upon a new report from the commissioners or not, the new report must be rejected as well as the original one, as being unreasonable and excessive.

Several cases from New Hampshire indicate the unwillingness of its court of last resort to allow undue partiality to be shown to the widow, at the cost of either creditors, children, or collateral distributees. Thus, where an estate amounted to \$2,250, the debts to \$575, and there were no lineal descendants, an allowance of \$600 to the widow was on appeal cut down to \$200.¹ Where the whole

estate was worth \$11,000, and that out of which the [* 169] * widow was entitled to dower \$2,000, an allowance of

\$2,000 was on appeal reduced to \$300.² Out of an estate worth \$25,000, there being no debts except voluntary bonds to two sons, disputed, and without valuable consideration, the land assigned as dower yielding a net income of \$200 per year, \$1,250 allowed by the probate court was reduced to \$750.³ So in an insolvent estate, amounting to \$6,400, in which the widow had been allowed \$600, and her dower was worth \$643, besides owning a house in her own right worth \$566, a further allowance was held unreasonable,⁴ and set aside.

In Massachusetts an allowance of \$895, beside her wearing apparel, was deemed reasonable for a widow of "elevated quality and degree." (Her husband had been sheriff of the county at the time of his death, and for many years a major-general of militia, "an office of much distinction and trust."⁵) In another case, where the real estate amounted to \$4,000, the personal estate to \$6,000, and the only heir was the intestate's father, an allowance of \$3,000 was cut down to \$1,000, considering that the widow would get \$500 on distribution, as the one-fourth of the residue after paying debts.⁶ And in a later case, where it appeared that an intestate's

¹ Foster v. Foster, 36 N. H. 437.

² Duncan v. Eaton, 17 N. H. 441.

³ Kingman v. Kingman, 31 N. H. 182,

191.

⁴ Cummings v. Allen, 34 N. H. 194, 197.

⁵ Crane v. Crane, 17 Pick. 422, 428.

⁶ Washburn v. Washburn, 10 Pick. 374

estate, wholly personalty, amounted to over \$163,000, but was insolvent; that the widow had a private income of \$1,200 a year; that there were no children, and that she and her husband had been living without charge with her father; and that they were persons of high social standing, accustomed to a costly mode of living, — an allowance of \$5,000 by the probate judge was reduced on appeal to \$500.¹

In Maine the widows seem to fare better. Out of an estate in which the personalty was insufficient to pay the debts, leaving \$700 to be paid out of the proceeds of real estate valued at \$2,000, the widow (of a packet master sailing between Eastport and Belfast) was allowed \$500.² In another instance, the widow of one whose estate amounted to between \$500,000 and \$600,000 was allowed by the probate judge \$75,000, which sum, on appeal by one of the executors, was by the appellate court increased to \$85,000.³

More liberal views are entertained in some other States. Thus it is held in Georgia that "the wise and liberal policy of our legislation certainly designed to include in the year's support something more than a bare subsistence, with clothes and shelter, * and perhaps the means of locomotion for the family." [*170] Hence it is error, in passing upon the report of the commissioners setting aside the year's support, to reject evidence to show the amount of outlay made by the decedent in the maintenance and education of his adult children, the gifts made to them upon attaining their majority, and the advances made to some of them, for which they were not required to account.⁴ An allowance of \$5,000 made by the ordinary, in addition to certain household and kitchen furniture and other personal property, was on appeal to the Superior Court reduced by the verdict of a jury to \$2,500; and it was held by the Supreme Court that the rejection of the evidence above alluded to, and of the expense of keeping minors at school and college, unduly restricted the jury, and a new trial was ordered.⁵

In California the widow of a decedent whose estate was valued at ten million dollars, mainly community property and free of debt, was allowed \$2,500 per month out of the estate, and the Supreme Court refused to disturb the allowance.⁶

In Illinois the "family" for which provision is to be made by the allowance is held to include not only the widow and minor children, but also adult children living with her, a woman who had been

¹ *Dale v. Bank*, 155 Mass. 141. It is to be noted that two of the judges dissented.

² *Brown v. Hodgdon*, 31 Me. 65, 70.

³ *Gilman v. Gilman*, 53 Me. 184, 191. It should be remembered, however, that under the statutes of Maine (Rev. St. ch. 65, § 21; ch. 75, § 9) this allowance was not a temporary one, but constituted the

whole of her interest in the personalty of the estate.

⁴ *Cheney v. Cheney*, 73 Ga. 66, 70.

⁵ *Cheney v. Cheney*, *supra*; see cases cited by the court, p. 71, to show that such claims are favorably considered by courts.

⁶ *In re Lux*, 114 Cal. 73.

raised in the family, the superintendent of the farm under the widow's control, the housekeeper, cook, and other house servants. An allowance of \$400 for beds and bedding, of \$1,600 for furniture, and of \$1,642 for a year's provisions, was held reasonable out of an estate valued at \$500,000.¹

§ 82. **The Allowance in Testate Estates.**—It will appear from the cases already cited,² that, as a general rule, the widow and children are the recipients of this bounty, whether the husband or father died testate or intestate.³ It is held in some States, that, where there is a will making provision for the widow, she is not entitled to the allowance unless she renounce the provisions of the will.⁴

Unless directed by statute, there is no difference whether the estate is testate or intestate.

This denial rests upon the doctrine that a person cannot take under a will and also claim rights contradictory to or in conflict with it,⁵ and must necessarily follow in every case [* 171] where this * doctrine is applicable, as in one of the cases cited, where the widow had actually enjoyed and consumed the property provided by will for her year's support, or where the provision in the will is sufficient to meet the immediate wants of the family; it has also been denied in cases where, by reason of sufficient separate property of the widow, or for any other reason, such wants do not exist.⁶ But where the testamentary provision is not expressed or clearly intended to be in lieu of the statutory allowance, the requirement to renounce the will seems to ignore and

¹ *Strawn v. Strawn*, 53 Ill. 263, 272. See *Boyer v. Boyer*, 21 Ill. App. 534, cited ante, p. * 168.

² *Ante*, § 80.

³ *In re Walkerley*, 77 Cal. 642; *Baker v. Baker*, 57 Wis. 382; *Turner v. Turner*, 30 Miss. 428; *Turner v. Fisher*, 4 Sneed, 209; *Compher v. Compher*, 25 Pa. St. 31; *Ruffin, C. J.*, in *Kimball v. Deming*, 5 Ired. L. 418, 420; *McReary v. Robinson*, 12 Sm. & M. 318; *Nelson v. Wilson*, 61 Ind. 255; *In re Lux, supra*; *Haven's Appeal*, 69 Conn. 684.

⁴ *Turner v. Turner, supra*; *Brown v. Hodgdon*, 31 Me. 65, 68; *Crane v. Crane*, 17 Pick. 422, 426; *Estate of McManus*, 14 Phila. 660.

⁵ *Little v. Birdwell*, 27 Tex. 688, 691; *Pearson v. Darrington*, 32 Ala. 227; *Langley v. Mayhew*, 107 Ind. 198, criticising prior Indiana cases; *Godman v. Converse*, 43 Neb. 463, reversing s. c. 38 Neb. 657.

⁶ *Leavenworth v. Marshall*, 19 Conn. 408, 418. So where a widow, under the law of Louisiana, accepted a succession

"purely and simply," the widow was not entitled to the \$1,000 allowed out of her husband's estate, because, by accepting the succession, it ceased to exist; she became the owner of the property, and hence liable for its debts: *Claudel v. Palao*, 28 La. An. 872. If the testator makes provision for his widow and specifically disposes of all the residue of his estate, so that the assertion by the widow of her statutory claim would defeat some material provision thereof, she will be required to elect: *Shafer v. Shafer*, 129 Ind. 394. But a general residuary devise or bequest is of itself insufficient to compel an election: *Shipman v. Keys*, 127 Ind. 353. Whenever it is reasonably clear that the provisions of the will were intended to be in lieu of the provision made for the widow by law, if she accepts the former she thereby waives the latter; and the intention need not be declared in words, but may be deduced from clear and manifest implication, if the claim under the law would be plainly inconsistent with the will: *Hurley v. McIver*, 119 Ind. 53.

defeat the very object and intent of the law, which is "merely to furnish her with a temporary allowance, by which she can support herself and dependent children until her interest in the estate can be set out to her;" and the more rational view seems to be that she is entitled to the allowance in addition to the provision made for

her in the will,¹ and that the husband cannot deprive his widow of the allowance provided for by the statute by any provision in his will.² In some States the courts seem to go to the extreme of holding that she is entitled both to her statutory allowance and a provision in the will expressed to be given in lieu of such allowance.³

In Missouri the allowance to the widow is expressed by statute to be "in addition to dower," a part of which (property selected by her not exceeding the appraised value of \$400) is to be deducted from her distributive share in the estate (also given under the dower act and not under the Statute of Descents and Distributions) if in excess of \$400, but is not liable for debts.⁴ Under this statute it is held that this allowance to the widow is no part of her dower proper, although in the nature of dower in being absolute against creditors and the right of the husband to dispose of by will;⁵ she is therefore entitled to such allowance, whether she *stands by the husband's will or rejects it to take under the [*172] law;⁶ and unless a contrary intention plainly appear from the language of the will, any bequest to her will be deemed to be in addition to, and not in lieu of, such allowance.⁷ The recent provision of the statute extending to the husband of a deceased wife the same allowances as a widow has in her deceased husband's estate, is expressed to apply only "if the wife shall die intestate."⁸

§ 83. **The Allowance with Respect to the Solvency or Insolvency of the Estate.** — The right of the widow and children is para-

¹ *Meech v. Weston*, 33 Vt. 561; *Deltzer v. Scheuster*, 37 Ill. 301; *Loring v. Craft*, 16 Ind. 110; *Vedder v. Saxton*, 46 Barb. 188; *Williams v. Williams*, 5 Gray, 24; *Bane v. Wick*, 14 Oh. St. 505; *Shipman v. Keys*, 127 Ind. 353, citing and harmonizing prior Indiana decisions; *Whiteman v. Severn*, 71 Ind. 530, 534; *Pulling v. Durfee*, 85 Mich. 34, 40, citing prior Michigan cases; *Wilson v. Morris*, 94 Tenn. 547; see also *In re Lux*, 114 Cal. 73.

² *Collier v. Collier*, 3 Oh. St. 369, 375; *Ward v. Wolf*, 56 Iowa, 465; *Baker v. Baker*, 57 Wis. 382, 392; *Chandler v. Chandler*, 87 Ala. 300, 303; *Peet's Estate*, 79 Iowa, 185, 191, except in New Jersey, where the expressed or implied intention of the testator governs; *Cary v. Monroe*, 64 N. J. Eq. 632, 637.

³ *Peeble's Estate*, 157 Pa. St. 605; *Collier v. Collier*, *supra*; see also *Blake-man v. Blakeman*, 64 Minn. 315, p. 317.

⁴ Rev. St. §§ 105-110.

⁵ It is "for the immediate sustenance of the widow, as is dower for her support during life; yet it differs from it in that it is made from the personalty owned at his death, and it becomes her absolute property": *Bryant v. McCune*, 49 Mo. 546, 547.

⁶ *Register v. Hensley*, 70 Mo. 189, 195.

⁷ *In re Klostermann*, 6 Mo. App. 314, 316; *Schoeneich v. Reed*, 8 Mo. App. 356, 362; *Hasenritter v. Hasenritter*, 77 Mo. 162; *Schwatken v. Daudt*, 53 Mo. App. 1

⁸ Laws, 1895, p. 35, § 110 a.

mount to that of creditors, and hence does not depend upon the solvency or insolvency of the estate.¹ In many, if not most, of the States, provision is made by statute that where the estate does not exceed in value a certain specified amount,² or the amount to which the widow or children are entitled absolutely, no administration shall be necessary, but all the property of the estate is to be assigned and turned over to the widow, or if no widow, to the children.³ It is held in Illinois⁴ that in such case the widow must pay the funeral expenses, and in Indiana⁵ the funeral expenses and expenses of last illness, out of the assets so received by her. In some States the allowance is to be deducted from the widow's distributive share, if the estate is found to be solvent,⁶ but generally it is left to the widow, either by express enactment or implication, in addition to her distributive share if the estate is solvent⁷ and is in no case liable for debts of the decedent. It follows that the property [* 173] is secured to *the widow and children irrespective of the value of the estate.⁸ In Iowa it was held that where it is

The allowance is not dependent upon the solvency of the estate.

Estates not exceeding in value the amount allowed to the widow not necessary to be administered.

¹ *Griesemer v. Boyer*, 13 Wash. 171, 176.

² In California, if under \$1,500, property all goes to widow; if under \$3,000, in the discretion of the probate court: 2 Civ. Proc. § 1469. In Georgia, if under \$500: Code, 1895, § 3465; *Stewart v. Stewart*, 74 Ga. 355. In Indiana, \$500: *Burn's Ann. St.* 1894, §§ 2575, 2576. In Michigan, \$150: 2 How. St. 1882, § 5847. In Nevada, \$500: Gen. St. 1885, § 2795. In Utah, \$1,500: *Stone's Estate*, 14 Utah, 205. In Vermont, \$300: Gen. St. 1880, § 2114. In Washington, \$1,000: Code, 1891, § 971. In Wisconsin, \$150, in addition to the specific allowances: *Ann. St.* 1889, p. 2070, pl. 4. See *post*, p. * 436.

³ So in Alabama: *Gamble v. Kellum*, 97 Ala. 677. Arkansas: *Dig. St.* 1894, § 3; Illinois. *St. & C. Rev. St.* 1896, p. 292, § 59; Missouri: *Rev. St.* 1889, § 2; and Oregon: *Gen. L.* 1887, § 1129.

⁴ *McCord v. McKinley*, 92 Ill. 11.

⁵ *Green v. Weever*, 78 Ind. 494.

⁶ So in Alabama, Florida, Maryland (property selected by the widow not exceeding \$150 in value, and if she have no children \$75 in value, is to be deducted out of her distributive share, unless the decedent left real estate exceeding \$1,000 in value), Missouri (where the \$400 in property to be selected by the widow is to

be deducted out of her distributive share in the estate if there be any, but not the other property or money allowed), and New Hampshire.

⁷ In Arkansas, if the estate is solvent, the widow may select property not exceeding the value of \$150 in addition to the amount allowed her without reference to solvency: *Dig. St.* 1884, § 63. In California (2 Civ. Proc. § 1466), Michigan (*How. St.* § 5847), Nebraska (*Gen. St.* 1887, ch. 23, § 176), Nevada (*Comp. L.* 1873, § 604), and Wisconsin (*Rev. St.* 1878, § 3935), the allowance for the support is limited in cases of insolvent estates to one year. In Georgia the appraisers are directed, in estimating the amount to be set apart for the support of the family, to take into account, among other things, the solvency or insolvency of the estate. In Maine (*Code*, 1883, p. 552) and Oregon (*Gen. L.* 1887, § 1128) the court may make an additional allowance if the estate turn out to be solvent, or additional property be discovered. In Indiana it is held that the widow takes the allowance in addition to her distributive share: *Cheek v. Wilson*, 7 Ind. 354.

⁸ *Curd v. Curd*, 9 *Humph.* 171; *Johnson v. Corbett*, 11 *Paige*, 265, 276; *Compher v. Compher*, 25 Pa. St. 31; *Hill v. Hill*, 32 Pa. St. 511; *Pride v. Watson*, 7 *Heisk.*

ascertained that an estate is insolvent, and that after the final settlement there will remain no sum whatever in the hands of executors for the widow or children, there is no provision of law that would justify an order directing the executors to pay a portion of the assets to the widow for her support and that of the minor children.¹

§ 84. **How affected by Marriage Settlements.** — It is obvious that property which may be the subject of a marriage contract, whether *ante* or *post nuptial*, is no less under the control and operation of law than property which passes by descent or under a will, and it has been held that the existence of a marriage contract, by which the widow had released all claims upon her husband's estate, is no defence to her claim for an allowance out of his estate for necessities.²

In New York it was held, that where the provision in an ante-nuptial agreement was an annuity to the widow for life in lieu of dower or any portion of his estate, and * the husband by will gave her an annuity during her widow- [* 174] hood only, he has failed to perform upon his part, and the widow is not precluded from claiming the property allowed to her by statute.³ The true principle, however, seems to be, that these laws rest upon a sound public policy, and that contracts running contrary thereto are for that reason and to that extent void. It is the policy of the law to preserve, as far as possible, the integrity and continuity of the family, and to protect it even against the thoughtlessness and improvidence of men and women. In this view the homestead laws, and laws exempting property from sale under execution and attachment, are enacted, and courts have decided contracts waiving this exemption prospectively to be void, as being

232, 234; *Hopkins v. Long*, 9 Ga. 261; *McNulty v. Lewis*, 8 Sm. & M. 520; *Loury v. Herbert*, 25 Miss. 101; *Mason v. O'Brien*, 42 Miss. 420, 427; *Silcox v. Nelson*, 1 Ga. Dec. 24; *Hays v. Buffington*, 2 Ind. 369.

¹ *In re Hieschler*, 13 Iowa, 597. It does not appear from the report of this case whether the widow and children had received anything for their support or not, and hence it does not establish the proposition that neither a widow nor minor children are entitled to an allowance for their temporary support.

² *Blackinton v. Blackinton*, 110 Mass. 461. But the ground on which this decision is based is the purely technical one, that the executors' defence to the widow's claim cannot be availed of in the probate court, for the want of equity powers to try the validity of the contract

or give effect to its provisions, and that on appeal the Supreme Court of probate can exercise no general equity powers, but is bound to make only such decree as the probate court should have made. It leaves the question itself untouched and unanswered, and rests upon the reasons given in an earlier case, — *Sullings v. Richmond*, 5 Allen, 187, 191, — which allowed a widow her *distributive* share in an estate notwithstanding her *ante-nuptial* agreement to accept certain provisions therein in the place of, and as a substitute for, her dower and every other claim by her upon his estate, — to wit, that the probate court had no authority to enforce a marriage contract. The case of *Tarbell v. Tarbell*, referred to in a note, was decided on the same principle.

³ *Sheldon v. Bliss*, 8 N. Y. 31.

contrary to public policy,¹ and also that a waiver of exemption by a deceased debtor will not avail the creditor as against the widow and minor children of the debtor.² The principle has equal application to widows and orphans when the provision made for them by law is threatened or assailed by a marriage contract. It was accordingly decided in Illinois, that the special allowance made by statute for the widow of a deceased person is as much for the advantage of the children of the deceased as for his widow, and cannot be affected by an ante-nuptial contract. "The law," says Mr. Justice Scott, "also charges the husband's estate with the support of his widow and his children residing with her, for the period of one year after his death, at least to the extent of certain articles of property, or their value in money. This latter right is one created by positive law, and attaches in all cases, whether there is sufficient property or not to pay the debts of the decedent. Being a statutory right, it is one of which the husband cannot deprive his wife and children, any more than he can relieve himself of his obligation to support them while living. It is in no case affected by the widow renouncing or failing to renounce the benefit of the provisions made for her in the will of her husband, or otherwise. Our laws on this subject have always been liberal, but the tendency of more recent legislation is to enlarge, rather than to abridge, the beneficial provisions in this regard. . . . It is an absurd conclusion that any ante-nuptial agreement can deprive the children of the means of support, in their

tender years, which the law has given. . . . We are at a [* 175] loss to understand how this humane provision of * the law for the family of a deceased party can be affected by an ante-nuptial contract, however broad and comprehensive in its terms."³ It is to be observed, however, that this right on the part of a widow to repudiate an executory marriage contract no longer exists after she has deliberately accepted its terms; in other words, she

¹ So in New York, Iowa, Kentucky, Wisconsin, Tennessee, and Louisiana. See *Thomp. on Homest.*, § 441, and cases there quoted and cited.

² *Wiggins v. Mertins*, 111 Ala. 164.

³ *Phelps v. Phelps*, 72 Ill. 545. But in Pennsylvania, where a husband and wife entered into a written agreement to separate, whereby each for a valuable consideration relinquished whatever marital rights either might have in the other's estate, and such separation was actual and continuous, it was held that after his death the wife could not claim the exemption allowed, as a member of the family: *Speidel's Appeal*, 107 Pa. St. 18. Similarly in California: *In re Noah*, 73 Cal. 583; *s. c.* 88 Cal. 468; *Wickersham v. Comer-*

ford, 96 Cal. 433. In Missouri it is held that an ante-nuptial agreement between husband and wife, that, upon the death of either, the other should claim no interest in the estate of the deceased, is not binding on the widow in a suit by her for the statutory allowance, where she has received nothing as a consideration for the alleged agreement: *Mowser v. Mowser*, 87 Mo. 437. It has also been held that a widow's statutory allowance is not barred by an ante-nuptial contract releasing all rights in the estate, "whether of dower or distributive share, or otherwise:" *Pulling v. Durfee*, 85 Mich. 34; nor where she releases "all her statutory estate": *Baker's Appeal*, 56 Conn. 586.

cannot both execute and repudiate the contract,¹ and the children are bound by her election. So it seems that where there are no children, the widow is bound by her contract and has no election unless given by statute.²

§ 85. **How affected by Liens or Preferred Debts of the Decedent.**

— In some cases it is held that the wife is entitled to her year's allowance out of her husband's estate in preference to a lien of a mortgage given by the deceased husband in his lifetime.³ So, in Texas⁴ and Georgia,⁵ it takes precedence over the lien of a judgment rendered against the decedent in his lifetime, but not, in Texas, over the landlord's lien for rent on the deceased tenant's crops, or vendor's lien.⁶ In Pennsylvania, since the exemption act of 1850, the widow's claim is good against all debts which were not liens prior to that act;⁷ no lien, whether that of a judgment creditor of the deceased who had loaned him money to pay for a house

* and lot of which he died seised,⁸ or of a mechanic on the [* 176] house which he erected, or any lien whatever save that for unpaid purchase-money, takes precedence of the allowance to the

¹ *Weaver v. Weaver*, 109 Ill. 225, 234, citing *Brenner v. Gauch*, 85 Ill. 368, and *Cowdrey v. Hitchcock*, 103 Ill. 262, 272, to same effect. But *Walker and Scott, JJ.*, dissent, holding that *Phelps v. Phelps* establishes as law that the statutory widow's award cannot be waived; the waiver is simply void. So it is held that a fair ante-nuptial agreement to relinquish the right to an allowance is not void, but, when carried out, it will be enforced against the widow in the proper tribunal: *Staub's Appeal*, 66 Conn. 127; *Paine v. Hollister*, 139 Mass. 144; *Heald's Appeal*, 22 N. H. 265.

² *Scott, J.*, in *Phelps v. Phelps*, 72 Ill. 545, 550; to similar effect, *Speidel's Appeal*, 107 Pa. St. 18; see also the opinion in *Staub's Appeal*, *supra*; *Paine v. Hollister*, *supra*, and *Tiernan v. Binns*, 92 Pa. St. 248.

³ *Cole v. Elfe*, 23 Ga. 235. The statute under which this decision was rendered provides for an allowance out of the estate immediately after the death of the testator or intestate, "notwithstanding any debts, dues, or obligations of said testator or intestate," and the court decided, in consonance with numerous previous decisions of that State, that "a mortgage in this State is nothing more

than a security for the payment of a debt; and that the title to the mortgaged property remains in the mortgagor, until foreclosure and sale, in the manner pointed out by statute." The principle announced was subsequently affirmed in *Elfe v. Cole*, 26 Ga. 197, *Benning, J.*, dissenting. *Ullmann v. Brunswick Co.*, 96 Ga. 625. The allowance takes precedence over a mortgage to secure a debt, but not over a conveyance passing the title subject to redemption on payment of the debt: *Burckhalter v. Planters' Bank*, 100 Ga. 428, 432. But of course the allowance does not take precedence of a lien attaching to the title when the deceased acquired it: *Murphy v. Vaughan*, 55 Ga. 361.

⁴ *Giddings v. Crosby*, 24 Tex. 295, 299.

⁵ *Commercial Bank v. Burckhalter*, 98 Ga. 736.

⁶ *Champion v. Shumate*, 90 Texas, 597.

⁷ *Hill v. Hill*, 42 Pa. St. 198, 204; *Baldy's Appeal*, 40 Pa. St. 328. It seems that in these cases no lien existed on any specific property, and from the language of *Thompson, J.*, in the latter case it is to be inferred that the creditor had obtained no judgment before the intestate's death. But see the cases *infra*.

⁸ *Nottes's Appeal*, 45 Pa. St. 361.

widow.¹ But in a late case it was held that any mortgage, whether for purchase-money or not, takes precedence of the widow's claim, but not the lien of a judgment.² In Alabama, while her claim is paramount to the rights of a creditor who holds a waiver of exemption of personalty by the decedents³ and to the rights of the personal representative for the general purposes of administration, and to preferred debts of the estate, it does not override liens created by the law, or by act of the deceased husband.⁴ In California the order setting out a parcel of land for the support of the minor children of a decedent does not divest the lien of a mortgage given by the decedent to secure the purchase-money.⁵ In Indiana a chattel mortgage executed by the decedent in his lifetime creates a lien superior to the widow's claim,⁶ but her right is not defeated because the property of her deceased husband is held under a levy made by the sheriff before his death.⁷ In Colorado the lien of a chattel mortgage is superior to the widow's allowance.⁸ In Iowa the widow's claim has preference over a creditor who furnished materials for the erection of a house, and omitted to obtain a mechanic's lien by reason of the administrator's assurance that it was not necessary.⁹ Since the property allowed to the widow is not, in most States, treated as assets of the estate, it would seem to follow that the widow is entitled to it in preference to creditors of any kind, whether for ordinary debts of the decedent, expenses of last illness, or even funeral expenses and charges for settling the estate;¹⁰ but in Illinois, where she might take certain enumerated articles, or in lieu thereof money, it was held that, if she elected to take money, she made herself a general creditor of the estate, remitted to take her share with other creditors.¹¹ In Tennessee the

In Alabama.

California.

Indiana.

Colorado.

Iowa.

Tennessee.

¹ Hildebrand's Appeal, 39 Pa. St. 133. "It is remarkable," says Woodward, rendering the opinion in this case, "that the . . . statute under which the widow claims says nothing about liens except liens for the purchase-money of real estate. These are not to be impaired by the widow's election of real estate. . . . And *expressio unius exclusio alterius*: Because no other lien was mentioned or referred to by the legislature, they meant that no other should prevail against the widow." Graves' Estate, 134 Pa. St. 377.

² Kauffman's Appeal, 112 Pa. St. 645, citing numerous authorities.

³ Wiggins v. Mertins, 111 Ala. 164.

⁴ Loeb v. Richardson, 74 Ala. 311, 314.

⁵ Fairbanks v. Robinson, 64 Cal. 250.

⁶ Recker v. Kilgore, 62 Ind. 10.

⁷ Dixon v. Aldridge, 127 Ind. 296.

⁸ Bennett v. Reef, 16 Colo. 431.

⁹ Estate of Dennis, 67 Iowa, 110.

¹⁰ Kingsbury v. Wilmarth, 2 Allen, 310; Whitehead v. McBride, 73 Ga. 741; Denton v. Tyson, 118 N. C. 542. This is not the case in Texas: see statutes referred to in Champion v. Shumate, 90 Tex. 597, 602.

¹¹ Cruce v. Cruce, 21 Ill. 46. In this case there were debts of the first, second, third, and fourth class, — the third class being trust-money, in which were allowed and placed the claims of two wards whose money the intestate had in hand at the time of his death, and the fourth general creditors, the court held that the widow was a general creditor, and that, as there were not sufficient personal assets to pay

widow takes the same title or interest in the property assigned for her year's support as the husband had, and she can recover no more than he could; hence where she takes a claim for wages due her husband's estate, she takes it subject to any set-off the debtor may have against it.¹

* § 86. **When the Allowance takes Effect.** — The right [* 177] of the widow to the money or property allowed for her and

her family's temporary support is held in some States, ^{Right vests on husband's death, or on confirmation by probate court.} to be absolute, and to vest at once upon the husband's death.² In others, it is held to vest upon confirmation or allowance by the probate court,³ or selection by the widow or guardian of minor children,⁴ and may then be recovered by her personal representative;⁵ and if the allowance to her is of such articles as she may have chosen, and if they are sold, although by her consent, but without a waiver of her claim to an allowance, she is entitled to the avails thereof.⁶ The probate court has no

the third class, the real estate might be sold, out of the proceeds of which the claim of the widow might be satisfied, if sufficient money remained after paying the third class in full.

¹ *Railway Co. v. Kennedy*, 90 Tenn. 185.

² So held in *Kellogg v. Graves*, 5 Ind. 509; *Brown v. Joiner*, 77 Ga. 232; s. c. 80 Ga. 486; *Benjamin v. Laroche*, 39 Minn. 334, *per Mitchell, J.*, concurring; *Mallory v. Mallory*, 92 Ky. 316; *Hastings v. Myers*, 21 Mo. 519; *McFarland v. Baze*, 24 Mo. 156, holding that it passes at once upon the husband's death, discharged of the lien of the debts, and may be assigned by her by deed even without consideration: *Cummings v. Cummings*, 51 Mo. 261; *Johnson v. Johnson*, 41 Vt. 467, deducing this consequence from the peculiarity of the statute, which authorizes the probate court to assign to the widow her share of the estate, not less than one-third after payment of debts, &c., and holding that her share is governed by the same rules as the share which passes to the heir; *Whitley v. Stephenson*, 38 Miss. 113; *York v. York*, 38 Ill. 522, 526; *Bratney v. Curry*, 33 Ind. 399; *Bayless v. Bayless*, 4 Coldw. 359, 361. She may sue for the property assigned her in her own name: *Railway Co. v. Kennedy*, 90 Tenn. 185. And the failure to file an inventory and appraisement of the personal property, as required by law, does not deprive the widow of this right: *Adkinson v.*

Breeding, 56 Iowa, 26, 27; *Hardin v. Pulley*, 79 Ala. 381.

³ *Runyan's Appeal*, 27 Pa. St. 121; *Kauffman's Appeal*, 112 Pa. St. 645. In this State the widow waives her right if she do not claim her exemption within a reasonable time, or if she remarries before making a demand: *post*, § 92, p. * 190.

⁴ *Mitcham v. Moore*, 73 Ala. 542, 545. In such case, no title to any particular property vests until the selection is made: *Little v. McPherson*, 76 Ala. 552; *Carey v. Monroe*, 54 N. J. Eq. 632, 636; though the right to the exemption vests immediately on the death of the decedent: *Hardin v. Pulley*, 79 Ala. 381, 386. When the estate does not exceed the amount allowed, and there is no administration, a selection is unnecessary, the right of exemption attaching to the whole unconditionally; possession, retention, and use constitute a sufficient election: *Gamble v. Kellum*, 97 Ala. 677. In Indiana the widow's right to take property at the appraised value, not exceeding \$500, continues up to the time of sale, although she has made a partial selection before the return of the inventory; in such case, injunction will lie to prevent an executor from selling, where the property is needed and cannot be replaced by her: *Denny v. Denny*, 113 Ind. 22.

⁵ *Dorah v. Dorah*, 4 Oh. St. 292. See *In re Lux*, 114 Cal. 73.

⁶ *Kingsbury v. Wilmarth*, 2 Allen, 310; in Missouri, at any time before such pro

power to authorize an executor to sell the articles provided by law for the support of the widow and her family, and she may, notwithstanding such order, maintain trespass against the executor,¹ or trover,² or hold him responsible as a wrong-doer, but not on his bond,³

or compel the delivery to her of the proceeds.⁴ The absolute title of the widow, and in the *absence of a widow, of the minor children, to the property allowed them for temporary support, follows of necessity in all of those States in which it is assigned to the widow or children without further administration, when it appears that the total value of the estate does not exceed the amount so allowed; for the abandonment of further administration rests solely upon the ground that there is no property to administer, because what property the decedent may have left is the property of the widow or children, in which no other person has any interest.⁵ But in some States it is held that, if the widow die before it is allotted to her, her right thereto abates, and it cannot be claimed by her administrator.⁶ "This allowance for necessities," say the commissioners revising the statutes of Massachusetts, "is not intended to compensate the widow for any apparent injustice to which she may, in any case, be exposed by the statute rules of distribution, or by the will of her husband; but merely to furnish her with a reasonable maintenance for a few weeks, and with some articles of necessary furniture, when she is not otherwise provided with them." It was held, in accordance with this view, that the death of the widow pending an appeal by the executors from an allowance made to her by the court of probate put an end to her claim.⁷ These decisions have, of course, no application to the widow's distributive share in her husband's estate, which vests in her at once upon the decease of her husband and passes to her representatives, although she has not come into the enjoyment of the

ceeds are paid out for debts, or in distribution; but it cannot be claimed out of the partnership estate of a firm of which her deceased husband was a member: *Julian v. Wrightsman*, 73 Mo. 569, 571, *et seq.*; nor, where the widow omitted to make her claim before the personality was exhausted in the payment of debts, can it be allowed to her out of the surplus in the administrator's hands from the proceeds of sale of real estate: *Ritchey v. Withers*, 72 Mo. 556, 559.

¹ *Carter v. Hinkle*, 13 Ala. 529, 533.

² *Graves v. Graves*, 10 B. Monr. 31.

³ *Morris v. Morris*, 9 Heisk. 814, 822.

⁴ *Grofton v. Smith*, 66 Miss. 408. See *post*, § 91, as to her right to the proceeds where the property is sold.

⁵ *Ante*, § 83, p. *172.

⁶ *Cox v. Brown*, 5 Ired. L. 194; *Kimball v. Deming*, 5 Ired. L. 418; *Ex parte Dunn*, 63 N. C. 137; *Simpson v. Cureton*, 97 N. C. 112, 116; *Tarbox v. Fisher*, 50 Me. 236, 238; *Carey v. Monroe*, 54 N. J. Eq. 632; *Succession of Tugwell*, 43 La. An. 879. In California the allowance not yet accrued at her death abates, but so much as had then accrued and was unpaid goes to her estate: *In re Lux*, 114 Cal. 73.

⁷ *Adams v. Adams*, 10 Met. 170. Conversely, if not appealed from, her right is conclusively established: *Drew v. Gordon*, 13 Allen, 120.

property before her decease;¹ nor where the property vests in the widow upon the husband's death.²

§ 87. **Separate Property of the Widow affecting the Allowance.**

— The object sought to be accomplished by the enactment of these laws, — to meet the actual wants and necessities of the widow and her family, — and the impossibility of framing a general law determining with accuracy the circumstances constituting such necessity, have * induced the legislature in many States to refer [* 179] the solution of this question to the probate court, with no limitation upon its discretionary power save such general injunctions as “having regard to all the circumstances of the case,” or to “the solvency or insolvency of the estate,” “to make such reasonable allowance as may be necessary,” “the amount necessary for sustenance,” “a sufficiency for the support of the widow and her family for twelve months,” etc. “Though no general rules,” says Shaw, C. J., “have or can be established regulating this judicial discretion, yet, to some extent, the considerations of justice and expediency on which the law is founded are plain and obvious, and from them we may infer the intention of the legislature. The case supposes the death of a husband leaving a widow. In the great majority of the cases he will have been a housekeeper; in many, a parent; in many, leaving children helpless and dependent. In many cases the widow, by the decease of her husband, may become the head of a household and family; new duties and obligations may rest upon her, causing an immediate demand for necessities, sometimes even before letters of administration can be granted. The purpose of the statute, we think, is to make a personal allowance to her to meet these necessities. But no one of these circumstances constitutes a condition to this allowance, or a decisive test of its fitness. The parties may not have been housekeepers, or even living together at the time of the husband's decease. She may have been absent at a hospital or infirmary, for the recovery of her health, bodily or mental, and stand in immediate need; or she may be on a visit to her friends; or by mutual consent and for their common benefit they may seek employment in different places, — as, for instance, the husband at sea, the wife in a school or factory. But these are all ‘circumstances’ —

¹ *Johnson v. Johnson*, 41 Vt. 467, 469: the statute fixed the minimum of the allowance at not less than one third of the residue, but the probate court must designate the amount.

² *Hastings v. Myers*, 21 Mo. 519; *Benjamin v. Laroche*, 39 Minn. 334, in which Mitchell, J. (concurring), says: “If she dies before making a selection, the prop-

erty allowed her goes to her personal representative or assigns, who may make the selection, where one is necessary, the same as she might do if living. The only effect of the selection is to give precision, so to speak, to the property which has already become hers on the husband's decease.”

and they are often numerous and various — to be taken into consideration by the judge to determine whether any allowance shall be made, and, if any, what. The amount of money left by the husband, and the amount of the separate estate and means of the wife, are also important circumstances bearing upon the question of her necessities.”¹ The possession of separate property by the widow, coupled with the circumstance that there were no children, induced

the court in this case to withhold an allowance. So in [*180] Texas the *allowance is upon condition that the widow and

children have no adequate separate property, and hence it was refused to children who had separate property of the value of \$2,493.50;² but a minor emancipated by his parents and earning wages sufficient for his support is not excluded thereby from the year's support.³ In Louisiana it may be shown, in derogation of her claim, that she has separate property.⁴ In New Hampshire the amount of dower to which the widow is entitled must be considered in determining upon her allowance.⁵ So in Maine the probate court may properly take into consideration the value of the widow's private estate, not derived from her husband.⁶ But in other States, and particularly where the articles of property allowed are enumerated by statute, the widow and children are entitled to this allowance irrespective of any separate property she or they may own. This view has never been questioned in Missouri, and was held in Vermont,⁷ California,⁸ Washington,⁹ Alabama,¹⁰ and Mississippi.¹¹ She takes also independent of what she receives under her husband's will.¹² In Nevada the statute provides that the amounts allowed for the support of the family go to the children if the widow have sufficient property of her own.¹³

§ 88. **What Constitutes a Family.** — The terms used to designate the recipients of this bounty are commonly “widow” “widow and children,” or “widow and her family.” The number of persons constituting a family is some-

A family in the popular sense is composed of the persons

¹ Hollenbeck v. Pixley, 3 Gray, 521, 525.

² Sloan v. Webb, 20 Tex. 189.

³ Cooper v. Pierce, 74 Tex. 526.

⁴ Succession of Aaron, 11 La. An. 671.

The statute provides that one thousand dollars may be applied to the relief of a widow in necessitous circumstances; and it is held that where she may be entitled to this or a greater sum in her own right, and there is a controversy with respect thereto, she may receive this sum out of the estate on giving bond to refund if she recover, or by assigning an equivalent part of the judgment when obtained to the estate: Succession of De Boisblanc, 32 La. An. 17, citing earlier Louisiana cases.

⁵ Duncan v. Eaton, 17 N. H. 441.

⁶ Walker, Appellant, 83 Me. 17.

⁷ Sawyer v. Sawyer, 28 Vt. 245, 248.

⁸ *In re Lux*, 100 Cal. 593, 603; *In re Lux*, 114 Cal. 73.

⁹ Griesemer v. Boyer, 13 Wash. 171 (in which case the widow took insurance provided for her by the husband).

¹⁰ Johnson v. Davenport, 42 Ala. 317; Thompson v. Thompson, 51 Ala. 493.

¹¹ Coleman v. Brooke, 37 Miss. 71; Whitley v. Stephenson, 38 Miss. 113; Wally v. Wally, 41 Miss. 657.

¹² *In re Lux*, 114 Cal. 73; Haven's Appeal, 69 Conn. 684.

¹³ Gen. St. 1885, § 2797.

who live together in one house and under one head or manager.

times an important circumstance in ascertaining the proper amount to be allowed for their maintenance and support, and it is therefore necessary that the legal meaning of the term be understood. It may be difficult to define the word accurately and scientifically, so as to include all the specific significations to which it is applied; but its popular meaning, and the sense in which it is used in the statutes under consideration, seem to be plain and unmistakable. Webster's primary definition is, "the collective body of persons who live in one house, and under one head or manager." This definition was adopted by Lindsay, J., in construing the constitution of Texas as to its exempting from sale under execution the homestead of the head of a family. "It" (meaning the homestead), he says, * "is intended to be made, by this constitutional provision, [*181] the inviolable sanctuary of the family: not merely the head of the family, but of all its members, whether consisting of husband, wife, and children, or any other combination of human beings, living together in a common interest and having a common object in their pursuits and occupations. Such a combination of persons, so circumstanced, necessarily constitutes a family."¹ This definition is in harmony with the etymological origin of the word, as well as its present popular acceptance. Webster indicates its derivation from the Latin *famulus*, a servant; thus *familia*, family, would indicate a body or society of persons *serving* each other, ministering to each other's necessities, wants, and comforts. As in ancient Rome *familia* included all of the slaves of a household, a household establishment, family servants, domestics, so the word "family" in modern times includes not only parents and children, or husband and wife, but also brothers and sisters and other relations, as well as servants and dependants, living together in a household establishment, governed or controlled by one person, who is its head or manager. In this sense husband and wife constitute a family;² a widowed sister and her brother for whom she keeps house;³ a son who provides for his widowed mother and children, who live with him;⁴ a father and his indigent daughter with her three minor children living with him;⁵ a brother, and an unmarried sister and two brothers under twenty-one years of age, having no means of their own and supported by the brother;⁶ a widow and the children of her deceased husband by a former wife;⁷ a father and his infant son dependent upon him for support;⁸ a widow with five orphan children of a deceased sister, who had been members of the family

¹ Wilson v. Cochran, 31 Tex. 677, 679; Rock v. Haas, 110 Ill. 528, 533.

⁵ Blackwell v. Broughton, 56 Ga. 390.

² Kitchell v. Burgwin, 21 Ill. 40, 45.

⁶ McMurray v. Shuck, 6 Bush, 111.

³ Wade v. Jones, 20 Mo. 75.

⁷ Sanderlin v. Sanderlin, 1 Swan, 441.

⁴ Connaughton v. Sands, 32 Wis. 387;

⁸ Cantrell v. Conner, 51 How. Pr. 45.

Marsh v. Lazenby, 41 Ga. 153.

during her husband's lifetime, and two other children of a sister of her late husband.¹ But the mere aggregation of individuals who are not dependent on each other has been held not to constitute a family in the sense of these statutes; neither an unmarried man, who has only servants and employees living with him,² nor a father having a family in another State, and accompanied by a son who [* 182] is not dependent *upon him,³ nor a single person living by himself,⁴ can be considered as the head of a family; and, conversely, the relation of parent and child, with its consequent condition of dependence, constitutes a family, although the members may not live together or under the same roof.⁵ A widow is entitled to the year's allowance for herself and step-children with her at the time of the husband's death, although the children be afterward, without her consent, taken away; and in such case no part of the allowance should be paid to the children's guardian.⁶ And servants, as well as adult children, but not boarders, are included under the word "family," in fixing the amount of allowance for a year's support.⁷ In North Carolina the statute defines the meaning of the word "family," as used in relation to the rights of widows, to include beside the widow every child either of the deceased or of his widow, and every other person to whom the deceased or widow stood in place of a parent, who was residing with the deceased at the time of his death, and whose age did not then exceed fifteen years.⁸

It will appear hereafter, in the discussion of the subject of dower,⁹ that a wife against whom the husband obtains a decree of divorce for her misconduct is not entitled to dower in his estate. She is likewise barred of any right to the provisions Divorced wife. made by statute for the support of the deceased husband's surviving family.¹⁰

§ 89. **Allowance to the Widow alone.**—Although the statute provide this allowance for "the widow and children constituting the family of the deceased," the widow alone may take, if there are no children.¹¹ And under a statute providing that, "if there be no infant children residing with the widow, and there be adult or infant children not residing with her, the provision contained in this section for the widow, or the value of such portion thereof as she receives, shall be charged to her in the distribution," it was held that the title to

If there are no minor children, widow may take the allowance alone.

¹ *Ex parte Brien*, 2 Tenn. Ch. 33.

² *Garaty v. Du Bose*, 5 S. C. 493.

³ *Allen v. Manasse*, 4 Ala. 554.

⁴ *Calhoun v. McLendon*, 42 Ga. 405; *Rock v. Haas*, 110 Ill. 528, 533.

⁵ *Sallee v. Waters*, 17 Ala. 482.

⁶ *Vincent v. Vincent*, 1 Heisk. 333; *Sanderlin v. Sanderlin*, 1 Swan, 441.

⁷ *Strawn v. Strawn*, 53 Ill. 263, 274.

⁸ Code, 1883, § 2119.

⁹ *Post*, § 109.

¹⁰ Because she cannot be considered as being included in such family: *Dobson v. Butler*, 17 Mo. 87, 90. See *infra*, § 89, on this point.

¹¹ *Little v. McPherson*, 76 Ala. 552; *Sawyer v. Sawyer*, 28 Vt. 245, 247; *Brown v. Brown*, 33 Miss. 39.

such allowance vested in the widow if there were no infant * children residing with her, and no adult or infant children [* 183] not residing with her.¹ Where the allowance is

Allowance to the widow and children payable to the widow. to the widow and children, it must be paid directly to the widow; the children are entitled to no part of it.²

In Iowa the property allotted to the widow does not become her absolute property, but is to be used by her so long as there is a family, and when it is no longer needed for the support of such family it reverts into the general assets of the estate.³ In Illinois the widow's award becomes her absolute property and disposable as she sees fit, free from all claims by the children,⁴ and the award made by the appraisers cannot be apportioned between her and the children of decedent by the probate court.⁵ In Mississippi it is held that, where the children do not live with the widow, but are provided for by a guardian, it is the duty of the probate court to apportion the amount allowed between the widow and children;⁶ and

Re-marriage abates allowance. where there is no child, the widow's interest in the property allotted to her exempt from execution ceases upon her marriage to another husband.⁷ A similar rule

¹ Newman v. Winlock, 3 Bush, 241.

² Nevin's Appeal, 47 Pa. St. 230. Says Strong, J.: "It was assumed her affection for the children would be a sufficient safeguard for their interests. In most cases the widow is the mother of the children. If she be but a step-mother, they are generally safe in her regard, not only for them, but for the deceased. Certainly it would not tend to the promotion of domestic harmony to invite the children (or relatives of the first wife using the names of the children) to assail the character of their father's widow, though but a step-mother, and contest her right to administer a bounty given by the law for herself and her deceased husband's family. Were such a door open, there is reason to believe it would not unfrequently call forth some of the worst passions, and the bounty of the legislature, instead of being a blessing, would prove a curse." (p. 232.) To the same effect Johnson v. Corbett, 11 Paige, 265. In Tennessee the exemption provided for by the statute vests in the widow for herself and in trust for the benefit of decedent's children; the ownership is for the benefit of all, and upon the death of any one of them while the property is yet on hand the interest of such one passes to those surviving: Sneed v. Jenkins, 90 Tenn. 137, 142; but where there are no minor

children it vests in her absolutely: Compton v. Perkins, 92 Tenn. 715. In Maine the court may divide the allowance between the widow and minors by a former wife, but is not bound to do so: Peters, C. J., in Davis v. Gower, 85 Me. 167. In Georgia it is held that a widow may sell land set apart as a year's support, on behalf of herself and children, when this is necessary for their support: Cox v. Cody, 75 Ga. 175. Though she remarries: Swain v. Stewart, 98 Ga. 366. But where she remarries, sells the land, and takes title in herself and husband, the sale is invalid: Vandigrift v. Potts, 72 Ga. 665. While the widow remains on the land and derives her support from it, the minor children, when they attain their majority, cannot coerce partition, nor otherwise disturb her occupation: Roberts v. Dickerson, 95 Ga. 727.

³ Gaskell v. Case, 18 Iowa, 147; Wilmington v. Sutton, 6 Iowa, 44; Schaffner v. Grutmacher, 6 Iowa, 137; Paup v. Sylvester, 22 Iowa, 371; and she has no right to sell such property and appropriate the proceeds: Meyer v. Meyer, 23 Iowa, 359.

⁴ Weaver v. Weaver, 109 Ill. 225, 234.

⁵ Scoville's Estate, 20 Ill. App. 426, 429, and cases cited.

⁶ Womack v. Boyd, 31 Miss. 443.

⁷ Carpenter v. Brownlee, 38 Miss. 200.

prevails in California.¹ In Georgia a different rule is applied, and the re-marriage of the widow does not deprive her of her right to the allowance.² A woman who has been divorced from her husband is self-evidently not entitled to this allowance, or any share in the estate of her former husband; having [* 184] ceased to be his wife during his * lifetime, she cannot be considered his widow after his death.³ In Pennsylvania the same rule is applied to a woman who has been divorced *a mensa et thoro*,⁴ to a woman who had deserted her husband more than twelve years before his death without reasonable cause,⁵ and to a wife who had left her husband and renounced all conjugal intercourse a considerable time before his death.⁶ So in Iowa the court holds that the family relation must have an actual existence, as distinguished from one that exists theoretically only, and that none such exists where husband and wife lived apart for seven years prior to his death, he boarding with others and neither contributing nor being asked to contribute to her support.⁷ On the other hand, a New York court, under somewhat similar circumstances, arrived at a contrary conclusion, construing the statute of New York.⁸ And so in Missouri a widow is entitled to her allowance whether or not she be living with her husband at the time of his death, and though she may have abandoned him without cause.⁹ In Massachusetts also the allowance may be given, although the widow at the time of her husband's death is living separate and apart from him.¹⁰ In North Carolina and Indiana the statute provides that a married woman who commits adultery and does not live with her husband at the time of his death loses her right to the year's allowance.¹¹

Divorced wife
not entitled to
an allowance.

Nor one who
had deserted
her husband
for a long time.

¹ Hamilton's Estate, 66 Cal. 576, holding that the allowance terminates on re-marriage without further order of court.

² Swain v. Stewart, 98 Ga. 366. There was in this case a minor child, but the opinion of the court proceeds on the theory that since the widow obtains a vested individual right at the husband's death, she cannot be deprived thereof by her second marriage, and no intimation is made by the court that a different rule would apply in the absence of minors.

³ Dobson v. Butler, 17 Mo. 87, 90.

⁴ Hettrick v. Hettrick, 55 Pa. St. 290. The reason given is, that it was the purpose of the act to make an immediate provision for the wants of the family when the head of it is removed by death, and has no application where the family relation did not exist.

⁵ Tozer v. Tozer, extract from the

opinion of Lowrie, J., in 2 Am. L. Reg. (1854), 510.

⁶ Odiorne's Appeal, 54 Pa. St. 175. So also where the separation was by contract: Speidel's Appeal, 107 Pa. St. 18. Similar decisions are found in other States: *In re Noah*, 73 Cal. 583; s. c. 88 Cal. 468; *Young v. Hicks*, 92 N. Y. 235.

⁷ Linton v. Crosby, 56 Iowa, 386.

⁸ Matter of Shedd, 60 Hun, 367, expressly declining to follow the construction placed on the Iowa statute.

⁹ It is sufficient if she be the wife at the time of his death: *Mowser v. Mowser*, 87 Mo. 437; *King v. King*, 64 Mo. App. 301.

¹⁰ *Chase v. Webster*, 168 Mass. 228, 231. In this case there was a divorce *nisi*, but not absolute.

¹¹ *Leonard v. Leonard*, 107 N. C. 171. In Indiana she must have left her hus-

The rules generally governing the disposition of property of a decedent situated in a State other than that of his domicile at the time of his death, demand that his personal property shall be disposed of according to the law of his last domicile, after payment of any debts he may owe in the State of the *rei sitæ*; ¹ and where the provisions of the statute securing the allowance are not applicable to the widow of a deceased resident of another State, ² it would seem that such allowance must be made in the State of the domicile, and satisfied out of the property there; or if there are not sufficient assets there, then out of the assets in the ancillary administration, upon application to the ancillary administrator. ³ It will be noticed that in such case the claims of the creditors in the State where the property is found must take precedence of such allowance. ⁴ In Alabama ⁵ and Pennsylvania, ⁶ the non-resident widow of a deceased resident is not entitled to these provisions. In New York, however, it was decided that even an alien widow, who had never been in this country, is entitled to this allowance; ⁷ and in Louisiana, where the widow "if in needy circumstances" is allowed the usufruct of \$1,000 in lieu of a home-
 *stead, it was allowed to one, although neither she nor the [*185] children had ever been domiciled in Louisiana. ⁸ So it is held in Georgia, that where a resident of Georgia died, leaving a widow and minor children who had never resided within the State, and had not been living with decedent for eleven years prior to his death, that they were nevertheless entitled to the statutory allowance out of his estate, as against creditors. ⁹ It is also held, in this

band and be living in adultery at the time of his death to forfeit her right to the statutory allowance on the ground of living separate and in adultery: *Zeigler v. Mize*, 132 Ind. 403.

¹ *Medley v. Dunlap*, 90 N. C. 527; *Smith v. Howard*, 86 Me. 203, 208; see, on the question of domicile, *post*, ch. xvii.

² As is held in Missouri: *Richardson v. Lewis*, 21 Mo. App. 531, 535; *Austin's Estate*: 73 Mo. App. 61; *Mississippi: Barber v. Ellis*, 68 Miss. 172; *Tennessee: Graham v. Stull*, 92 Tenn. 673; *Maine: Smith v. Howard*, 86 Me. 203, 211; *North Carolina: Medley v. Dunlap*, *supra*; though she subsequently became a resident of the State: *Simpson v. Cureton*, 97 N. C. 112.

³ *Medley v. Dunlap*, *supra*, p. 529; *Shannon v. White*, 109 Mass. 146.

⁴ *Simpson v. Cureton*, 97 N. C. 112, 115; see also *Smith v. Howard*, 86 Me. 203, 211.

⁵ *Pearson ex parte*, 76 Ala. 521.

⁶ *Spier's Appeal*, 26 Pa. St. 233; *Coates' Estate*, 12 Phila. 171; *Platt's Appeal*, 80 Pa. St. 501, 504. But even in this State, where it appears that the wife was left in the foreign country by the husband, expecting to follow him here so soon as he could provide her a home, and that she was at all times willing to join him, but the husband, after his arrival conceals from her the knowledge of his whereabouts and bigamously marries another woman, on his death the foreign widow is nevertheless entitled to her allowance: *Grieve's Estate*, 165 Pa. St. 126. This case distinguishes the prior cases on the ground that in all of them the separation was the voluntary act of the wife.

⁷ *Kapp v. Public Administrator*, 2 Bradf. 258.

⁸ *Succession of Christie*, 20 La. An. 383, on the ground that the *lex domicilii* of the husband controlled.

⁹ *Farris v. Battle*, 80 Ga. 187.

State, that the wife of a non-resident intestate may sue there for her year's support, yet the amount of the recovery is controlled by the *lex domicilii*.¹ In Washington, also, the court says that the non-residence of the widow of a deceased resident will not deprive her and the minor children of the right of an allowance.²

§ 90. **Allowance to the Children alone.**—As the widow alone, if there are no children, may claim the allowance under a statute securing it to the widow and children, so the children alone are entitled if there is no widow. Their right does not depend upon the assertion of it by the mother.³ And where the children of a former wife live separate from the widow, under the control of their guardian, it is the duty of the probate court to make such an apportionment between the widow and the children as will, under the circumstances, and taking into account the sum necessary for the support of each, be just and equitable.⁴ In such case the *posthumous* child of a decedent is entitled to a share in the sum allowed for the year's support.⁵ And so the widow is entitled under a statute securing her certain specific exemptions where there were infant children residing with her, if she be *enceinte* at the time of the husband's death, and afterwards delivered of a child.⁶ The administrator of the joint estate of a deceased husband and his first wife, under the law of Texas, cannot appropriate the entire allowance for one year's support, though furnished from the community property of the first marriage, to the exclusive use of the children of the first marriage, where there are also minor children of the deceased husband by the second marriage; and the fact that the mother of the children of the second marriage left the homestead, and permitted the children of the first marriage to occupy it, does not debar the former from their *pro rata* interest in the amount of the allowance.⁷ The children of a widow who dies intestate, a house-keeper and head of a family, are entitled to the property [* 186] * which the law sets apart for the support of a widow and children, the same as if the intestate were a widower.⁸ And the children have such a substantial interest in the

Children alone entitled to the allowance, if no widow.

Posthumous children.

Children of different mothers.

Children of a deceased widow.

¹ Mitchell v. Ward, 64 Ga. 208, Jackson, J., dissenting.

² Griesemer v. Boyer, 13 Wash. 171, 176. The statement of facts, however, seems to show that the widow became non-resident after the husband's death, though the court does not base its remarks on that ground, and cites Farris v. Battle, *supra*, and Succession of Christie, *supra*, as authorities.

³ Edwards v. McGee, 27 Miss. 92;

Whitcomb v. Reid, 31 Miss. 567; Woodbridge v. Woodbridge, 70 Ga. 733.

⁴ Womack v. Boyd, 31 Miss. 443. See *ante*, § 89, p. *183, showing that in most States the allowance is payable to the widow alone (if the children live with the widow).

⁵ Womack v. Boyd, *supra*.

⁶ Husbands v. Bullock, 1 Duv. 21.

⁷ Harmon v. Bynum, 40 Tex. 324.

⁸ Leshar v. Wirth, 14 Ill. 39; Himes's

property set apart for the widow's support that a marriage contract, in which the widow had waived such an allowance, is held void as to them.¹ But where the widow and minor children are entitled to occupy the ordinary dwelling-house and the messuage thereto free of rent for one year, and the guardian of the minor children removes them from her, he cannot maintain an action against her to recover any part of the rental value of the premises for such year.² In Georgia the minor child of a married woman whose husband survives her cannot have a year's support assigned out of her estate.³ So it is, in Alabama, held that the statutory provisions in favor of the widow or minor children of a decedent do not apply in favor of the minor children out of the mother's estate.⁴ In New York it is held that, while the widow is entitled to her reasonable sustenance out of the estate of her deceased husband, whether solvent or insolvent, no provision is made for the sustenance of the children of an insolvent decedent, the statutory provision being confined to the widow.⁵ The same is held to be the law in North Carolina.⁶ In Tennessee, when minor children have no guardian, it is the duty of the administrator to preserve out of the estate their year's support.⁷

§ 91. **Out of what Property to be allowed.**— Since the administration of estates is ordinarily confined to the personal property left by a decedent, and the executor or administrator is usually his *personal* representative, his real estate passing at once to the heirs, devisees, or dowress, the allowance for the temporary support of the widow and family is rarely a charge upon the real estate, but granted, generally, out of the personal property left by the decedent only.⁸ Hence money representing the proceeds of real estate cannot be allowed to the widow under this claim,⁹ although she be entitled to all the personalty of the estate, leaving the expenses of administration to be deducted out of the proceeds of the sale of real estate,¹⁰ and even

Appeal, 94 Pa. St. 381, 383; Rev. St. Mo. § 110.

¹ Phelps v. Phelps, 72 Ill. 545. See ante, § 84.

² Weaver v. Low, 29 Ind. 57.

³ Such child takes equally with the father as distributee: Phelps v. Daniel, 86 Ga. 363.

⁴ Davenport v. Brooks, 92 Ala. 627.

⁵ Johnson v. Corbett, 11 Paige, 265.

⁶ Cox v. Brown, 5 Ired. L. 194; Kimball v. Deming, 5 Ired. L. 418.

⁷ Rhea v. Greer, 86 Tenn. 59. See post, § 92, p. * 191.

⁸ Jelly v. Elliott, 1 Ind. 119; Paine v. Paulk, 39 Me. 15; Drowry v. Bauer, 68

Mo. 155; Hale v. Hale, 1 Gray, 518, 523; Motier's Estate, 7 Mo. App. 514. See also Hammersley, J., in Haven's Appeal, 69 Conn. 684, 698.

⁹ Paine v. Paulk, *supra*; Drowry v. Bauer, *supra*; Ritchey v. Withers, 72 Mo. 556; Jewell v. Knettle, 39 Mo. App. 262; Lloyd's Estate, 44 Mo. App. 670; Bowling v. Shepard, 91 Ky. 273; Loftis v. Loftis, 94 Tenn. 232; Denton v. Tyson, 118 N. C. 542.

¹⁰ Brazer v. Dean, 15 Mass. 183; Denton v. Tyson, *supra*. See as to the priority of the widow's claim, ante, § 85, p. * 176.

if the personalty had been specifically devised;¹ and where, having a right to select, and she selects a judgment founded upon a promissory note, inventoried among the effects of the estate, which [* 187] had been partially satisfied by a levy upon real and * personal estate, she is entitled to the proceeds of the levy upon the personal estate, and to a release from the executors of the unredeemed real estate.² And under these circumstances she is also entitled to the interest accrued upon the note after the date of the inventory and appraisement.³ Where the statute enumerates the specific property to which the widow is entitled, the allowance must be out of such articles actually on hand at the time of the husband's death, and no property or money not on hand can be assigned to her.⁴ But if the articles so enumerated, or, where she has the right to select, the articles so selected, are executor or administrator, she is entitled to the proceeds of the sale.⁵ Where the statute fails to designate the specific nature of the allowance, it may be allotted in money.⁶ In Illinois, however, it was held, that if the widow elected to take her allowance in money, she thereby became a general creditor of the estate, and must share with other creditors;⁷ but she may cause the real estate to be sold to raise the necessary money to pay her statutory allowance;⁸ in Iowa, if the personalty is inadequate, real estate may be sold to raise the allowance;⁹ so in Minnesota, when the personalty is insufficient, the allowance may be made out of the proceeds of real estate sold, or out of the rents and profits,¹⁰ and in Pennsylvania her allowance of \$300 may be out of personal or real estate, and remains charged on the real estate until paid.¹¹ It is self-evident that there can be no allowance to the widow or children out of property to which the decedent had no

Articles specifically allowed by statute cannot be supplemented out of other property if not on hand.

sold by the

But if sold, the widow may take the proceeds, or sell them herself.

Allowance cannot be made out of property not belonging to the deceased.

¹ *Brown v. Hodgdon*, 31 Me. 65.

² *Gilman v. Gilman*, 54 Me. 531.

³ *Gilman v. Gilman*, *supra*, p. 536.

⁴ *Bayless v. Bayless*, 4 Coldw. 359; *Johnson v. Henry*, 12 Heisk. 696; See *v. See*, 66 Mo. App. 566.

⁵ *Cummings v. Cummings*, 51 Mo. 261. In Alabama it is held that to cut off the widow's claim, the sale must be such as the administrator is authorized to make: *Chandler v. Chandler*, 87 Ala. 300, 304. In Georgia, where the Code (§ 2571) is construed as including real estate in the property which may be set apart for the year's support of the family, it is held that, where land has been so set apart, it may be sold without further order of the ordinary, and the proceeds applied for the

support of the family: *Miller v. Defoor*, 50 Ga. 566; *Tabb v. Collier*, 68 Ga. 641; *Cleghorn v. Johnson*, 69 Ga. 369. A sale by the widow fairly made will pass the title to the land to the purchaser: *Steed v. Cruise*, 70 Ga. 168, 176.

⁶ *McNulty v. Lewis*, 8 Sm. & M. 520; *Hoar, J.*, in *Drew v. Gordon*, 13 Allen, 120, 122; *Ex parte Reavis*, 50 Ala. 210; *Estate of McReynolds*, 61 Iowa, 585.

⁷ *Cruce v. Cruce*, 21 Ill. 46. See this case, *ante*, § 85, p. * 176, note 11.

⁸ *Deltzer v. Scheuster*, 37 Ill. 301.

⁹ *Newans v. Newans*, 79 Iowa, 32.

¹⁰ *Blakeman v. Blakeman*, 64 Minn. 315.

¹¹ *Detweiler's Appeal*, 44 Pa. St. 243. See also *Graves' Estate*, 134 Pa. St. 377.

title at the time of his death.¹ The widow's right extends only to property possessed by deceased at the time of his death, and in Connecticut it was held that the husband may make a contract, on sufficient consideration to bequeath his personalty to another which will be enforced.² In Illinois it is held that there is nothing in the * statute respecting the estates of deceased persons [* 188] that in the slightest degree prevents a husband from disposing of his personal property free from any claim of his wife, whether by sale, gift to his children, or otherwise, in his lifetime.³ In some States the husband's right of disposition of his personalty during his lifetime is carried to the extent of permitting him to defeat his wife's statutory allowance by a gift *causa mortis*;⁴ but in most States the more rational doctrine prevails that such disposition is invalid as against the widow if made in expectation of death and with a view to defraud the widow of her statutory rights in the personalty.⁵ The allowance is not to be made out of a grandfather's estate, but only out of that of a deceased father or mother.⁶

§ 92. **Time and Procedure to obtain the Allowance.**—Where the widow herself administers the estate, she can easily avail herself of the benefit of the provisions made in her favor by simply taking credit in her settlement with the court for the amount allowed her by order of court, the award of appraisers or commissioners, or the amount fixed by the statute. In such case, also, she will rarely suffer in consequence of neglect or tardiness in taking the necessary steps to secure her allowance. But in many cases it is impracticable for her to administer, either from age, infirmity, ignorance, or inability to give bond, and then, from the exigency of her situation and the very nature of the relief secured to her by the statutes under consideration, a speedy and summary remedy to obtain her rights is indispensable,⁷ and

¹ *Summerford v. Gilbert*, 37 Ga. 59; *Burckhalter v. Planters' Bank*, 100 Ga. 428, 431; *Murphy & Co. v. Rulh*, 24 La. An. 74; the allowance should be made from property belonging unqualifiedly to the estate and not from such as is in controversy: *Eddy's Estate*, 12 Phil. 17; *Baucus v. Stover*, 24 Hun, 109, 114. In Missouri the allowance cannot be made out of the estate of the partnership of which the deceased was a member: *Julian v. Wrightsman*, 73 Mo. 569; but in Massachusetts it has preference over partnership creditors against the partnership property left by a deceased surviving partner: *Bush v. Clark*, 127 Mass. 111. In Alabama, the right of the widow to claim exemption of her husband's share in partnership property is not lost or waived, although the

surviving partner, administering on the estate of his deceased partner, has prematurely paid debts out of his own funds: *Little v. McPherson*, 76 Ala. 552.

² *Croft v. Layton*, 68 Conn. 91, 101.

³ *Padfield v. Padfield*, 78 Ill. 16.

⁴ See cases cited *ante*, § 63.

⁵ See authorities cited *ante*, § 63. But before a disposition will be avoided, it should be shown to be testamentary in its character and clearly in fraud of the wife's "dower" right in the personalty. *Crecelius v. Horst*, 89 Mo. 356, 359.

⁶ *Succession of Geisler*, 32 La. An. 1289, overruling *Succession of Coleman*, 27 La. An. 289.

⁷ It was held in Michigan, that where the action of the probate judge in denying allowances has been reversed on appeal,

is in most States provided by enabling the widow to obtain her allowance by simple motion or petition, if the court or commissioners should omit to grant it without such motion.¹ Notice to the administrator is not in every State necessary,² but is in some States required by statute,³ and the safer course and better practice is undoubtedly for the court to require notice to be given, at least in cases [*189] where a considerable amount is in *question.⁴

in summary proceeding.

Notice to administrator.

May be made by administrator without order of court.

The administrator is not required to wait for an order of court, but may make the necessary expenditures as the exigencies occur, and the court will allow such sums as may be reasonable in the settlement;⁵ or the widow may simply retain the property she is entitled to, which the administrator will not be permitted to recover;⁶ but the probate court has exclusive jurisdiction in such case,⁷ and if she claim and retain property not secured to her, he may assert his right thereto against her and her vendee;⁸ and on the other hand, the court may order the property to be assigned to her.⁹ In Illinois the appraisers fix the widow's award, and the probate court, while it may for good cause shown order another appraisement or remove the appraisers,¹⁰ had no power to modify the award or estimate, nor substitute the judgment of the court for that of the appraisers.¹¹ So in Colorado, (whose statute was adopted from the Illinois code) the probate court may approve the report of the commissioners; but the court has the authority to entertain an application, presented after such approval, and order a new appraisal.¹²

the fact that a motion is pending to set aside the order of reversal is no valid reason for the probate judge further delaying the setting off of these allowances: *Curtis v. Probate Judge*, 35 Mich. 220.

¹ *Calvit v. Calvit*, 32 Miss. 124; *Connell v. Chandler*, 11 Tex. 249. But the allowance cannot be made until she has accounted for funds in her hands: *Churchill v. Bee*, 66 Ga. 621.

² *Morgan v. Morgan*, 36 Miss. 348; *Leach v. Pierce*, 93 Cal. 614, 619.

³ *Goss v. Greenaway*, 70 Ga. 130, 132. In such case the administrator is a necessary party: *McElmurray v. Loomis*, 31 Fed. Rep. 395; and objections may be made at or before the term for which the notice is given: *Parks v. Johnson*, 5 S. E. R. (Ga.) 243.

⁴ *Cummings v. Allen*, 34 N. H. 194; *Wright v. Wright*, 13 Allen, 207; *Heck v. Heck*, 34 Oh. St. 369; *Palomares's Estate*, 63 Cal. 402. In Michigan it has been said that such an order, made without

notice to the administrator, would be void: *Freeman v. Probate Judge*, 79 Mich. 390; but verbal notice is sufficient, at least if the administrator appears: *Bacon v. Probate Judge*, 100 Mich. 183.

⁵ *In re Lux*, 100 Cal. 606; s. c. 114 Cal. 89; *Crow v. Pratt*, 119 Cal. 131, 136; *Sawyer v. Sawyer*, 28 Vt. 245, 248; *Frierson v. Wesberry*, 11 Rich. L. 353; *Clayton v. Wardell*, 2 Bradf. 1, 7; *Fellows v. Smith*, 130 Mass. 376.

⁶ *Eans v. Eans*, 79 Mo. 53, 65. In Texas, the allowance must be made by the court, and the property cannot be selected by the beneficiaries: *Chifflet v. Willis*, 74 Tex. 245, 251.

⁷ *Griswold v. Mattix*, 21 Mo. App. 282, 285.

⁸ *Bell v. Hall*, 76 Ala. 546.

⁹ *Heller v. Leisse*, 13 Mo. App. 180, 182.

¹⁰ *Boyer v. Boyer*, 21 Ill. App. 534.

¹¹ *Scoville's Estate*, 20 Ill. App. 426, and cases cited.

¹² *Lipe v. Fox*, 21 Colo. 140.

Where the entire estate is not greater than what is allowed to a widow without administration, she may defend her title in equity, although the probate court has made no order in the matter;¹ and where the amount is less than the widow's allowance, she can maintain an action against a mere intruder, though there has been no administration.² Where an application by the widow or minor

Application, if necessary, should be made early, or the allowance may be barred.

children is necessary at all, it should be made as early as possible, since, as a general rule, it cannot be entertained when the time for which the temporary allowance was intended has expired.³ Thus it was held that after a lapse of four years from the husband's death the probate court had not the power to grant the allow-

ance,⁴ much less after thirty years.⁵ In North Carolina it was held that the application must be made during the first term of the court after the grant of letters, and that a petition filed two years thereafter was too late;⁶ but where no letters were granted until eight years after the husband's death the widow was held entitled to her allowance during the term.⁷ The allowance must be made

Amount of allowance determined by condition of family at time of death.

with reference to the state of the family at the time of deceased's death, not of the application.⁸ In Massachusetts a delay of two years and eight months was held not to make it impossible, as a matter of law, to decree an allowance;⁹ and in Michigan the allowance was

permitted after the remarriage of the widow, nearly two years after the first husband's death, no assets having come into the administrator's hands before that time.¹⁰ In Indiana, where the * widow is authorized to select "at the time of the valuation" certain articles of property, it was held that it was not the duty of the executor or administrator to set apart and tender the property, and that, if she does not select before it passes into other hands, she must be deemed to have waived her privilege.¹¹ So, in Mississippi, it was decided that the authority to grant and apportion such allowance between the widow and children resided exclusively in the probate court, and that all parties claiming rights in such apportionment must be held to the presentation of their claims before the report of the appraisers shall have been confirmed by the probate court under the provisions of the statute, or else be deemed

¹ Hampton v. Physick, 24 Ark. 561.

² Roberts v. Messenger, 134 Pa. St. 298.

³ Ordinarily, the application should be made as soon as the inventory of the estate is returned: Kingman v. Kingman, 31 N. H. 182; but a delay of twenty-five days is not unreasonable: *Ib.*, p. 187.

⁴ Hubbard v. Wood, 15 N. H. 74.

⁵ Mather v. Bennett, 21 N. H. 188.

⁶ Gillespie v. Hyman, 4 Dev. 119.

⁷ *Ex parte* Rogers, 63 N. C. 110. See Rizer's Estate, 15 Phila. 547.

⁸ *In re* Hayes, 112 N. C. 76; Porter v. Porter, 165 Mass. 157.

⁹ Lisk v. Lisk, 155 Mass. 153.

¹⁰ Bacon v. Probate Judge, 100 Mich. 183.

¹¹ Johnson v. Robertson, 7 Blackf. 425; Tucker v. Henderson, 63 Ala. 280, 282.

to have waived them in favor of those beneficiaries whose claims are presented; and that hence a chancery court has no power to grant relief to children petitioning for a portion of such award against the widow, to whom it had been made.¹ But where such award had been set out by the appraisers, and, the estate turning out to be insolvent, the commissioners of insolvency declined to take cognizance of her claim for the year's support, it was held that the claim might be asserted at any time before the final settlement of the estate, the time for asserting it not having been limited to the year succeeding the decedent's death, or to any particular time.² In Pennsylvania it has been repeatedly decided that the right of a widow to retain real or personal property of her husband's estate of the value of \$300 is a personal privilege which she may waive; and that it is waived entirely by an unreasonable delay,³ or by her re-marriage before making demand,⁴ or if she neglect to demand an appraisement, and *pro tanto* if she retain less than the value of \$300.⁵ But where a husband deserted his wife, and the separation continues without fault of the husband, she is not required at her peril to take notice of his death; and if she make her application within reasonable time after learning of his death, although eighteen months afterward, and after the real estate had been sold, the account on the estate had been filed, and the auditors to distribute appointed, it must be allowed.⁶ In Alabama⁷ and

[* 191] * Texas it is the imperative duty of the judge of probate to make the allowance, upon or without the motion of the widow;⁸ and the widow and children do not forfeit or lose their right to the same from their neglect to apply, or the failure of the chief justice (probate judge) to make it in time; but if the estate is solvent, it is too late to make such application when the estate is ready for partition and distribution. "The time during which the statute intends to secure the property to the widow and children has then passed, and a subsequent right to it, by virtue of such allowance, is expressly repudiated."⁹ In Illinois the widow's claim is held not to be included in the statutory provision requiring demands to be presented against a decedent's estate within two years, and may be

Duty of judge to make allowance without application.

¹ Dease v. Cooper, 40 Miss. 114.

² McNulty v. Lewis, 8 Sm. & M. 520, 526.

³ Kerns' Appeal, 120 Pa. St. 523.

⁴ Machemer's Estate, 140 Pa. St. 544, 548.

⁵ Somers's Estate, 14 Phila. 261; Andress's Estate, 14 Phila. 263; Davis's Appeal, 34 Pa. St. 256; Burk v. Gleason, 46 Pa. St. 297; Baskin's Appeal, 38 Pa. St. 65; Huffman's Appeal, 81 Pa. St. 329; Lawley's Appeal, 9 Atl. R. 327.

⁶ Terry's Appeal, 55 Pa. St. 344, 346; Rank's Estate, 12 Phila. 67; Hurley's Estate, 12 Phila. 47.

⁷ Mitcham v. Moore, 73 Ala. 542, 545.

⁸ Connell v. Chandler, 11 Tex. 249. But where an allowance has been made and the widow for many years forbears the enforcement of it, she will be estopped from asserting it: Tiebout v. Millican, 61 Tex. 514.

⁹ Little v. Birdwell, 27 Tex. 688, 691.

allowed although not presented within two years.¹ In Missouri, by the terms of the statute, the allowance may be claimed at any time before it is paid out in discharge of debts, or distributed; but where the personal assets are exhausted before the claim is made, it cannot be allowed out of the proceeds of real estate sold for the payment of debts.² The issue of fact, whether the claimant is the widow of the decedent, cannot be tried by jury in the probate court.³ Where a decision granting letters in favor of a petitioner who claims to be the widow, is appealed from on the ground that she is not the widow, and bond given to stay proceedings, it was held that pending such appeal the probate court cannot make an allowance to the alleged widow.⁴ In Wisconsin a widow was allowed her statutory allowance, notwithstanding she had, within a year, surrendered the estate devised to her, for the benefit of creditors, including her exemptions.⁵ In Tennessee where, in case there is no widow, the minor children under fifteen years are entitled to a year's support, it is the duty of the administrator, if such minors have no guardian, to preserve for them a year's support, and he is personally liable for his failure to do so, although such year's support was not assigned within one year after the decedent's death, nor until the administrator had disbursed the entire assets.⁶

§ 93. **Additional Allowances.** — Whether a second claim for the widow's allowance can be entertained or granted, must obviously depend upon the nature of the original allowance. If this was intended for immediate relief only, and was granted before there was an opportunity of determining the extent of the allowance to which the situation of the widow and her family, the value of the property left by the deceased, the amount of debts, and other circumstances entitled her, it is apparent that such allowance cannot be looked upon as an adjudication upon the matter, and that, in the absence of a restraining statute, the probate court has power to make a new allowance upon proper proof of the circumstances justifying it.⁷ In many States, the statute expressly, or by necessary implication, * grants the power to make additional [* 192] allowances.⁸ But where it is allowable out of the personal

There may be additional allowance, if the amount originally allowed was intended to be partial only.

¹ *Miller v. Miller*, 82 Ill. 463.

² *Ante*, § 86; *Ritchey v. Withers*, 72 Mo. 556, 559.

³ *Bradley v. Woerner*, 46 Mo. App. 371.

⁴ *State v. Lichtenberg*, 4 Wash. 231.

⁵ *Henry's Estate*, 65 Wis. 551.

⁶ *Rhea v. Greer*, 86 Tenn. 59.

⁷ *Hale v. Hale*, 1 Gray, 518.

⁸ In *Arkansas* the widow may select

property not exceeding the value of \$150, in addition to the amount absolutely allowed, if the estate is solvent: Dig. St. 1894, § 75. In *California*, if the amount set apart be insufficient for the support of the widow and children, or either, the probate court makes such additional allowance out of the estate as may be necessary during the process of settle-

estate only, there can be no further allowance when that is exhausted, although it be in the payment of debts.¹ And if, upon the appraisement of the specific articles to which the widow is entitled, she elect to take money in lieu thereof, this election concludes her in the absence of fraud, and she cannot afterward have a larger allowance.² And so, if the widow has drawn her support from her husband's estate during the year succeeding his death, although it was not formally set apart to her, and although she rendered valuable services to the estate during that period, she is entitled to no further allowance by way of the year's support.³ The petition for further allowance must show that the former provision is insufficient or exhausted.⁴ The appraisers appointed to set out for the use of the widow and minor children their temporary allowance are ministerial officers, and their acts may be revised by the court,⁵ but in some States the court cannot modify the appraisement and substitute its own judgment for that of the appraisers.⁶ Nor can the circuit court, on appeal, exercise any power which the probate court could not have exercised.⁷ A court of probate which is without power [* 193] * to revoke or revise its own decrees and judgments, cannot set aside its own allowance and decree a smaller sum, unless the original judgment was reversed, or reformed on appeal, or

ment: 2 Civ. Proc. § 1466; Roberts's Estate, 67 Cal. 349; *In re Lux*, 100 Cal. 593. In *Georgia*, if the estate is kept together longer than one year, the allowance is to be renewed by the original or by newly appointed appraisers: Code, 1895, § 3466. In *Iowa* the allowance may by subsequent order be diminished or increased: Code, 1897, § 3314. In *Maine*, if the will be in litigation, the court may make allowances from time to time: Rev. St. ch. 65, § 23; otherwise the court has jurisdiction to make but one allowance: *Davis v. Gower*, 85 Me. 167; unless the estate prove solvent after a representation of insolvency, or new assets be discovered: *Paine v. Forsaith*, 84 Me. 66. In *Michigan* the judge is to allow such amount for maintenance as he may deem necessary, in case of insolvency for not longer than one year: How. St. 1882, § 5847 (it is held, that after one year, in testate estates, the probate judge may use his discretion as to continuing the allowance until her share is assigned her: *Pulling v. Probate Judge*, 88 Mich. 387, 390). So in *Nebraska*: Gen. St. 1887, ch. 33, § 176. In *Nevada* the widow and minor children remain in possession of the homestead,

wearing apparel, and household furniture, and such reasonable provisions for their support as the probate judge may allow. On return of the inventory, or subsequently, the judge may on his own motion or on application set apart for the use of the family all property exempt from execution; and if this be deemed insufficient for their support, the probate judge may make additional reasonable allowance during the pendency of the settlement, but not longer than one year if the estate is insolvent: Gen. St. 1885, § 2791. In *Vermont* the maintenance is to be out of the personal or income of real estate, but never longer than until the widow's share in the estate be assigned her: Gen. St. 1880, § 2109. So in *Wisconsin*: 2 Ann. St. 1889, § 3935.

¹ *Hale v. Hale*, *supra*; *Ritchey v. Withers*, 72 Mo 556

² *Telford v. Boggs*, 63 Ill. 498.

³ *Blassingame v. Rose*, 34 Ga. 418

⁴ *Luther's Estate*, 67 Cal. 319.

⁵ *Applegate v. Cameron*, 2 Bradf. 119.

⁶ *Miller v. Miller*, 82 Ill. 463. See *ante*, p. * 189.

⁷ *Telford v. Boggs*, 63 Ill. 498.

adjudged void.¹ But where the probate judge refuses to grant an application to adjudge an estate insolvent for the want of sufficient evidence to support it, he may, on a new application supported by sufficient evidence, grant the same.² And an order allowing certain amounts to be paid periodically during the settlement of the estate may be modified so as to reduce the future payments, if it be shown that the circumstances have changed; but without such proof an order reducing the allowance made is an abuse of discretion.³ In Michigan the allowance may, in the sound discretion of the probate judge, be added to, modified, or rescinded at any time.⁴

¹ *Pettee v. Wilmarth*, 5 Allen, 144; *In re Stevens*, 83 Cal. 322. most it can only stop future allowances from the time of presenting the petition:

² *Buckman v. Phelps*, 6 Mass. 448.

Ford v. Ford, 80 Wis. 565.

³ *Baker v. Baker*, 51 Wis. 538, 548.

⁴ *Freeman v. Probate Judge*, 79 Mich. 390; *Power's Estate*, 92 Mich. 106. The order should not be retroactive; at

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* CHAPTER X.

EXEMPTION OF THE HOMESTEAD.

§ 94. Nature of the Homestead Right of the Surviving Family.

— The policy which dictates provision for the support of the family immediately after the death of its natural provider and protector also requires the homestead to be secured to the surviving husband or widow and minor children. The obvious intent of homestead laws is no less to secure a home and shelter to the family, when bereft of its father or mother, beyond the reach of financial misfortune, which even the most prudent and sagacious cannot always avoid,¹ than to protect citizens and their families from the miseries and dangers of destitution² by protecting the wife and children against the neglect and improvidence of the father and husband.³ The homestead exemption would be divested of its most essential and characteristic feature, if, upon the death of the head of the family, it should be withdrawn from the widow and children; hence nearly all the statutes upon this subject provide for its continuance to the surviving constituents of the family. It has been held that "the exemption is not to the debtor, as such, but to the head of a family. The subject of the protection is the family, — the head of the family being referred to as its representative. It would be an unreasonable and unnatural conclusion to hold that this provision was not intended for the security of families deprived of their natural protector. That the head of the family must be the debtor, in order to secure such protection, is neither within the letter nor within the spirit of the law. Whenever there is a family and a family homestead, it is to be presumed that there is a head to the family, or one peculiarly charged with responsibility for [* 195] the protection of the family; and the homestead is to be *regarded as the family homestead of the head of such family, within the meaning of the constitution."⁴

The homestead exemption descending to widows and minors is not strictly an estate, or property, given as such to those entitled to

Shelter to wife and children in case of improvidence or misfortune, as well as in case of the death of the head of the family.

¹ Wassell v. Tunnah, 25 Ark. 101, 103.

² Franklin v. Coffee, 18 Tex. 413, 415.

³ Cook v. McChristian, 4 Cal. 23, 26.

⁴ Willard, J., in *In re Kennedy*, 2 S. C. 216, 227; see *Roff v. Johnson*, 40 Ga.

555, 558; *Miller v. Marx*, 55 Ala. 322. Stone, J., tracing the origin of homestead laws in Alabama and the United States generally.

Homestead not an estate, but an exemption against creditors and heirs. it under the homestead law; but rather a privilege, extended to the beneficiaries thereof, protecting them in the enjoyment of property to which it applies against the claims of creditors or the rights of adult heirs; even if regarded as an estate in legal contemplation "it is of that peculiar kind which exists rather as incidental to, than independent of, other estates:"¹ as creditors could not enforce their demands out of the property constituting the homestead during the lifetime of the debtor, so no creditor, either of the decedent, or of any member of the surviving family, nor adult heirs, can enforce them after his death, so long as there is a family, or, in most States, a widow.² So it is held, that the husband's right of curtesy in the homestead of his wife, during the minority of her children, yields to their right to occupy the homestead.³ In some States the exemption ceases with the reason for it, where one has no family.⁴ This right of the widow and minor children is treated as an *exemption*, continuing during the minority of the children and the life or widowhood of the widow by the statutes of Alabama,⁵ Arizona,⁶ Arkansas,⁷ California,⁸ Colorado,⁹ Georgia,¹⁰

Statutes treating the homestead as an exemption during minority and widowhood.

¹ Granger, C. J., dissenting, in *Strong v. Garrett*, 90 Iowa, 100, 104.

² *Black v. Curran*, 14 Wall. 463, 469; *Burns v. Keas*, 21 Iowa, 257; *Hicks v. Pepper*, 1 Baxt. 42, 44; *Myrick, J.*, in *Estate of Moore*, 57 Cal. 437, 442, 444; *Hill v. Franklin*, 54 Miss. 632, 635; *Trotter v. Trotter*, 31 Ark. 145, 151.

³ *Thompson v. King*, 54 Ark. 9, 11; *Littell v. Jones*, 56 Ark. 139, 145; *Loeb v. McMahon*, 89 Ill. 487, 490.

⁴ *Hill v. Franklin*, 54 Miss. 632, 635; *Kidd v. Lester*, 46 Ga. 231. See as to what constitutes a family, *ante*, § 88; *post*, § 96.

⁵ The homestead is exempt from administration by the terms of the statute, and the widow and minor child or children have the right of occupation until it is ascertained whether the estate is solvent or insolvent; and if insolvent, it vests in them absolutely: Code, 1886, § 2543; *Miller v. Marx*, 55 Ala. 322, 341; *Dossey v. Pittman*, 81 Ala. 381, 383; *Eatman v. Eatman*, 83 Ala. 478. But the insolvency must be declared during the minority of the children claiming an absolute fee; the declaration after majority does not revive and enlarge the homestead estate which terminated with the minority: *Baker v. Keith*, 72 Ala. 121. If there are no children, the fee in such case passes to

the widow, and on her death descends to her brothers and sisters to the exclusion of those of the deceased husband: *Wilkins v. Walker*, 115 Ala. 590.

⁶ In this State, if the homestead be community property, it descends to the survivor; but if from the separate property of either spouse, it goes to the heirs, subject to the power of the probate court to assign it for a limited period to the family of the deceased: Rev. St. 1887, § 1100.

⁷ Dig. St. 1894, § 3694. It is held in this State, that where one dies seised of a homestead, leaving minor children, these have two distinct estates in the land, existing at different times and incapable of merger; the estate of homestead, with the right of entry on the ancestor's death; and the inheritance, with right of entry on the death of the youngest child: *Kessinger v. Wilson*, 53 Ark. 400, 403.

⁸ C. Civ. Pr. 1885, § 1474. The estate passes subject to the power of the probate court to assign it for a limited period to the use of decedent's family: *Phelan v. Smith*, 100 Cal. 158, 165.

⁹ Mills' Ann. St. 1891, § 21.

¹⁰ One entitled may take the constitutional or statutory homestead at option, but cannot take both: *Johnson v.*

Idaho,¹ Kansas,² Kentucky,³ Louisiana,⁴ Maine,⁵ Massachusetts,⁶ Michigan,⁷ Minnesota,⁸ Mississippi,⁹ Missouri,¹⁰ New Hampshire,¹¹ New [*196] Jersey,¹² New York,¹³ North Carolina,¹⁴ North Dakota,¹⁵ *Ohio,¹⁶

Roberts, 63 Ga. 167. During the widowhood of the widow, whether there be any family living with her or not, and the life of any member of the family in the legitimate sense, no remainder or reversionary interest is subject to levy and sale: *Herslam v. Campbell*, 60 Ga. 650, 652.

¹ On the death of the owner the homestead goes to the heirs or devisees subject to the power of the probate court to assign it for a limited period to the family: *Rev. St. 1887*, § 3073.

² *Gen. St. 1889*, § 2593; *Vandiver v. Vandiver*, 28 Kans. 501; *Vining v. Willis*, 40 Kans. 609, 620; *Dayton v. Donart*, 22 Kans. 256, 268.

³ *St. 1894*, § 1707; *Gay v. Hanks*, 81 Ky. 552; *Myers v. Myers*, 89 Ky. 442, 445.

⁴ *Const. 1879*, art. 219; *Voorhies' Rev. St. 1876*, § 1694. Homestead laws in this State are held to be in derogation of the common law, and therefore to be strictly construed: *Galligar v. Payne*, 34 La. An. 1057.

⁵ *Rev. St. 1883*, ch. 81, § 66.

⁶ *Publ. St. 1882*, p. 739, § 8.

⁷ 2 *How. St. 1882*, § 7721.

⁸ *McCarthy v. Van der Mey*, 42 Minn. 189.

⁹ *Ann. Code, 1892*, § 1551.

¹⁰ Formerly the law was construed as vesting the fee to the homestead in the widow, subject to the cotenancy of all the children during minority: *Skouten v. Wood*, 57 Mo. 380, 383; *Rogers v. Marsh*, 73 Mo. 64, 69. But the General Assembly, in their session next following the first of these decisions, limited the widow's interest to an exemption during her life: *Laws Mo. 1875*, p. 60, § 1; *Rev. St. 1889*, § 5439. A decision, that under this statute the widow had the mere right of occupancy, which was lost by removal from the premises (*Kaes v. Gross*, 92 Mo. 647, 655), was subsequently overruled, and it was then held that the statute vests in the widow an estate for life, and in the children during their minority: *West v. McMullen*, 112 Mo. 405, 411, to the enjoy-

ment of the rents and profits of which neither the widow nor minor children lost their right by removal from the premises: *Hufschmidt v. Gross*, 112 Mo. 649, 655; nor by the re-marriage, and gaining a new home with her new husband, of the widow: *West v. McMullen*, *supra*; *Ailey v. Burnett*, 134 Mo. 313, 317. But, apparently to meet this construction of the statute in the recent cases above cited, the legislature in 1895 enacted that "the children shall have the joint right of occupation with the widow until they shall arrive respectively at their majority, and the widow shall have the right to occupy such homestead during her life or widowhood, and upon her death or remarriage it shall pass to the heirs of the husband," etc.: *Laws Mo. 1895*, p. 186, § 2.

¹¹ *Publ. St. 1891*, ch. 128, § 2. The exemption in this State constitutes a life estate which the widow may convey: *Lake v. Page*, 63 N. H. 318; but not before it has been set out and separated from the residue: *Gunnison v. Twitchell*, 38 N. H. 62, 66; *Bennett v. Cutler*, 44 N. H. 69.

¹² 3 *Gen. St. 1895*, p. 2997, ¶ 63, § 1.

¹³ *Code, Civ. Pr.* § 1400.

¹⁴ *Const.*, art. x. The right of the widow to the homestead is held paramount to that of the children, by virtue of dower: *Watts v. Leggett*, 60 N. C. 1977, cited and followed in *Gregory v. Ellis*, 86 N. C. 579, 583.

¹⁵ A life estate in the homestead descends to surviving spouse, and if none, to children an estate during minority: *Rev. Code, 1895*, § 3626.

¹⁶ *Bates Ann. St. 1897*, § 5437. The homestead act of this State, as amended May 1, 1871, was held to limit the widow's right to such time as a minor child lived with her: *Taylor v. Thorn*, 29 Oh. St. 569, 575. But the language of the statute construed in this case, "who shall have left a widow and a minor child or children," is changed in the revision of 1890, § 5437, by substituting the word *or* for *and*.

Oklahoma,¹ South Carolina,² South Dakota,³ Tennessee,⁴ Utah,⁵ Virginia,⁶ Washington,⁷ West Virginia,⁸ Wisconsin,⁹ and Wyoming.¹⁰ It does not, therefore, affect the rights of either creditors

On termination, heirs and creditors take. or heirs on the expiration of the time to which the exemption is limited; the property constituting the homestead then passes to those entitled to it under devise or descent, subject to the claims of creditors,¹¹ as if no homestead had intervened.¹² In Arkansas¹³ and North Carolina¹⁴

Widow not entitled if not in need. the widow, having a homestead in her own right, is not entitled to the exemption of that of her deceased husband; and in Louisiana¹⁵ a widow in necessitous circumstances,

Allowance in lieu of homestead.

whose homestead does not amount to the value of one thousand dollars, may have such amount paid to her out of the succession as, together with her homestead and other exemption, will equal one thousand dollars.¹⁶ In Texas there is to be an allowance out of the decedent's estate, in favor of the widow and minor children, in lieu of a homestead, not exceeding five thousand dollars, if no such homestead can be set apart in kind.¹⁷

Homestead descending as an absolute estate in fee.

But in some of the States, the homestead is not a mere exemption in favor of the widow, but passes to her an absolute estate in fee, in derogation of the rights

¹ St. 1890, § 1375.

² Under the act of 1880 (17 Stat. 513) the homestead descends under the Statute of Distribution on the death of the widow, but the exemption as against creditors continues: "It appears that the intention was to declare the property exempted forever discharged from liability for debt," says Chief Justice McIver, rendering the opinion of the Supreme Court in *Stewart v. Blalock*, 45 S. C. 61, 67.

³ Comp. Code, 1887, § 2463.

⁴ Code, 1884, § 2943. Before 1878, the homestead right depended on occupation: *Hicks v. Pepper*, 1 Baxt. 42, 44; but now the statute makes it a life estate, vesting in the surviving spouse on death of either, and on death of both, an estate in the children during minority: *Jarman v. Jarman*, 4 Lea, 671, 676.

⁵ Comp. L. 1888, § 4113; *Knudson v. Hannberg*, 8 Utah, 203, 208.

⁶ Code, 1887, § 3649.

⁷ Code, 1896, § 5458.

⁸ Code, 1891, ch. 41, § 34.

⁹ Sanb. & Berryman, Ann. St. 1889, § 2271.

¹⁰ Rev. St. 1887, § 2781.

¹¹ See discussion of this subject in

connection with the sale of real estate for the payment of debts, *post*, § 483. See also *post*, § 102.

¹² *Post*, § 102; *Booth v. Goodwin*, 29 Ark. 633, 636, affirming earlier cases; *Taylor v. Thorn*, 29 Oh. St. 569, 574; *Heard v. Downer*, 47 Ga. 629, 631; *Chalmers v. Turnipseed*, 21 S. C. 126, 138; *Garibaldi v. Jones*, 48 Ark. 230; *Grawell v. Seybolt*, 82 Cal. 7; *Strong v. Garrett*, 90 Iowa, 106.

¹³ Dig. St. 1894, § 3694.

¹⁴ *Wharton v. Leggett*, 80 N. C. 169, *arguendo*, quoting art. x., § 5, of the constitution.

¹⁵ *Voorh. Rev. St.* 1876, § 1694.

¹⁶ See *Succession of Lessassier*, 34 La. An. 1066; *Stewart v. Stewart*, 13 La. An. 398; *McCall v. McCall*, 15 La. An. 527; *Succession of Wellmeyer*, 34 La. An. 819; *Coyle v. Creevy*, 34 La. An. 539.

¹⁷ *Rev. St.* 1895, §§ 2048 *et seq.*; *Clift v. Kaufman*, 60 Tex. 64, 67. The right thereto is not forfeited by subsequent marriage: *Ib.*, p. 66, citing *Pressley v. Robinson*, 57 Tex. 453, 460. But it will be deemed abandoned, if not claimed for many years: *Tiebout v. Millican*, 61 Tex. 514.

not only of creditors, but also of the heirs. Such is [* 197] the homestead law in * Vermont,¹ where the widow and minor children take, by virtue thereof, *the same estate* in the homestead "of which the deceased died seised,"² the children, however, until their majority only. The statute of Missouri, patterned after the Vermont statute, was likewise construed to vest the homestead in the widow in fee simple absolutely, subject only to cotenancy of the children during minority, until the law was amended.³ In Illinois the homestead law, prior to the act of 1873, secured a mere exemption to the debtor, so that when he conveyed without formal waiver of the homestead, the effect was to convey his title to the land; but as to the right to the homestead, the operation of the deed was suspended until the exemption was extinguished in some mode recognized by the statute.⁴ But by the act of 1873 a radical change was wrought in the quality of the holding of the homestead by the householder. By that act he became invested with an estate in the land measured and defined by the value, and not by the extent or quantity of his interest in the land or lot.⁵ And when the interest of the householder in the premises, whether in fee, for life or years, does not exceed one thousand dollars in value, the homestead estate comprises and embraces his entire title and interest, "leaving no separate interest in him to which liens can attach, or which he may alien, distinct from the estate of homestead."⁶ When the value of the property to which the estate attaches is more than one thousand dollars, the excess is unaffected by the statute;⁷ whether there are creditors or not; and a court of equity may decree the payment of the value to the widow, and compel her to accept the same in lieu of her homestead.⁸ The estate of homestead devolves on the widow *ex instanti* upon the death of the husband, for her benefit and that of the minor unmarried children. Major or married heirs have no interest in the rents and profits of the homestead.⁹ In Alabama the homestead remains in the possession of the widow and minor children, exempt from administration until it is ascertained whether the estate is solvent or insolvent, and if

¹ St. 1894, § 2183; *Day v. Adams*, 42 Vt. 510, 516.

² Construed to mean as well the particular estate, legal or equitable, held by the husband, as also the extent to which it was free from debts: *Day v. Adams*, *supra*; *White v. White*, 63 Vt. 577, 580.

³ See *supra*, note on p. * 195 (Missouri).

⁴ *Eldridge v. Pierce*, 90 Ill. 474, 479.

⁵ *Kitterlin v. Milwaukee, &c.*, 134 Ill. 647.

⁶ *Browning v. Harris*, 99 Ill. 456, 459; *Hartman v. Schultz*, 101 Ill. 437; *Kitterlin v. Milwaukee*, *supra*.

⁷ *Kitterlin v. Milwaukee*, *supra*.

⁸ *Wilson v. Illinois Trust Co.*, 166 Ill. 9, 12, following the principle laid down in *Hotchkiss v. Brooks*, 93 Ill. 386, adjusting the homestead right of a wife as against the husband's grantee.

⁹ *Kyle v. Wills*, 166 Ill. 501, 511.

In Alabama. found to be insolvent, the homestead vests absolutely in the widow and minor children.¹ So in Utah;² and in Texas: If the estate is solvent, the homestead descends like other property, except that it is not subject to partition during the lifetime of the surviving husband or wife, or so long as they or the minor children occupy the same;³ but if insolvent, it descends in like manner, but discharged of the claims of creditors.⁴

In Texas. In Florida the exemption descends to the widow and heirs, minors and adults, discharged from the decedent's debts,⁵ whether such heirs live upon the homestead or not;⁶ or whether or not they live in the State.⁷

In Florida. In Iowa, also, the surviving spouse may occupy the homestead until the distributive share has been set apart, or in lieu thereof retain the homestead for life; and if there be no survivor, it descends to the issue of either unless otherwise directed by will, and is held by such issue exempt from their parents, and their own antecedent debts.⁸

In Iowa. In Nebraska the homestead, on the death of its owner, vests in the surviving spouse for life, and afterward in his or her heirs forever, exempt from any debts created by either spouse previous to or at the time of such husband or wife's death.⁹

In Nebraska. In South Carolina, also, the widow's interest in fee, under the Statute of Distributions, is her homestead, set apart to her and her children out of her husband's estate, and is forever freed from debts contracted after the adoption of the constitution containing the homestead grant.¹⁰

In South Carolina. In Mississippi the homestead descends to the surviving husband or wife of the owner and children in common; and if there be no children of the decedent, to the surviving husband or wife, and if no survivor, to the children;

¹ See *supra*, p. *195, note 5.

² *Knudson v. Hannberg*, 8 Utah, 203.

³ Const. Tex. 1876, art. xvi., § 52.

⁴ *Zwernemann v. Von Rosenberg*, 76 Tex. 522, 525, and *Lacy v. Lockett*, 82 Tex. 190, 193, Stayton, C. J., dissenting in both cases, holding that the interest inherited by adult heirs fixes upon them liability for debts of the ancestor to the extent of the value inherited. The majority view was adhered to in *Cameron v. Morris*, 83 Tex. 14, 17.

⁵ Const. 1887, art. x., § 2.

⁶ *Miller v. Finnegan*, 26 Fla. 29, 32, 37.

⁷ *Scull v. Beatty*, 27 Fla. 426, 436.

⁸ Rev. St. 1888, §§ 3182, 3183. It appears from this statute that a testamentary disposition defeats the homestead claim of the issue; that the homestead cannot be claimed in addition to the distributive share of the survivor; and it has

been held that the right of the issue does not depend on occupancy of the surviving parent; also that a non-resident adult heir is entitled to his share, although he has given a note waiving his homestead right before the parent's death: *Maguire v. Kennedy*, 91 Iowa, 272; the surviving husband or wife may select the distributive share of one-third (exempt from decedent's debts) out of property other than the homestead and thereby surrender the homestead right as to himself or herself; but by so doing the children will nevertheless have their homestead rights against creditors: *Coulson's Estate*, 95 Iowa, 696.

⁹ *Durland v. Seiler*, 27 Neb. 33, 37. It is to be noted that the debt sought to be enforced in this case was for the unpaid purchase-money in question. *Schuyler v. Hanna*, 31 Neb. 307.

¹⁰ See *supra*, p. *196, note.

and if no children or survivor, the exemption ceases, and the homestead passes like other property. But if the surviving husband or wife own a place of residence equal in value to the homestead of the decedent, and shall have no children, but the deceased shall have children by a former marriage, then the homestead of the decedent shall descend to such children.¹

In Arizona, California, Louisiana, Nebraska, Nevada, [*198] Texas, and Washington the law recognizes *a kind of property known in the civil law as community property,²

which to some extent affects the disposition of the homestead on the death of either of the tenants in community. Like the common-law estate by the entirety, it exists between husband and wife, and generally descends to the survivor on the death of either or to the survivor and heirs of the decedent. In California a statute vesting the homestead

Homestead in community property.

in community property absolutely in the surviving husband or wife on the death of one of the spouses free from debts or liabilities contracted before was held to deprive the children of any homestead right against claims accruing subsequent to such death, and to subject the estate in the hands of the survivor to be disposed of as he or she sees fit, although it has been set apart as a homestead by the probate court;³ but § 1465 of the Code of Civil Procedure of that State is held to direct the setting apart of a homestead "for the use of the surviving husband or wife and the minor children," and by the provisions of § 1468 "the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child" or children; and it is held that under this statute a surviving widow has no power to convey her interest in the community property so as to deprive herself or the children of the right or duty to claim the same as the family homestead; nor can her grantee take as tenant in common so as to defeat such right;⁴ the homestead is one of the burdens upon the community property subject to which the surviving wife takes her interest therein.⁵ In Texas it is held that on the death of a connubial partner the interest of

In California.

In Texas.

the deceased in the community property goes to the heir, but, if a homestead, subject to the homestead rights of the surviving partner; and where that is abandoned, the heir is entitled to partition.⁶ But the survivor has the power to sell a community

¹ Peeler v. Peeler, 68 Miss. 141, holding that "children" does not apply to grandchildren.

² As to the nature of community property, see *post*, § 122.

³ Herrold v. Reen, 58 Cal. 443, 446; Watson v. His Creditors, 58 Cal. 556; Bollinger v. Manning, 79 Cal. 7, 11; although it exceed, at the time of the

death, the statutory allowance: *In re Burdick*, 76 Cal. 639, two judges dissenting 642.

⁴ Phelan v. Smith, 100 Cal. 158, 164; Hoppe v. Fountain, 104 Cal. 94, 100.

⁵ *In re Still*, 117 Cal. 509.

⁶ Bell v. Schwartz, 37 Tex. 572, 574; that a widow has not occupied it for two years does not make out a case of abandonment.

homestead, whether the estate be solvent or not, and the children have no interest in the homestead as such, as against the surviving parent, by virtue of the homestead right of the deceased parent.¹

In Washington. In Washington the widow cannot claim a homestead in her deceased husband's separate property which he has conveyed by will to another.²

In Delaware, Indiana, Maryland, Oregon, Pennsylvania, and Rhode Island the statutes contain no special provisions touching homesteads further than including their exemption from sale under execution in the amount of property which the head of a family may select as exempt.

§ 95. What Tenement constitutes the Homestead descending.

— The homestead thus transmitted to the surviving family of one dying is the homestead in fact, — the dwelling-place occupied by the family, with all the land and its appurtenances to the extent allowed by the statute,³ including the crops growing thereon⁴ at the time of the death.⁵ Subsequent appreciation or depreciation in the value of the property does not affect the tenure.⁶ Unless so expressed by statute, the survivors *do not acquire, in consequence of such death, [*199] the right to select a homestead out of the body of the decedent's estate;⁷ and where the statute confers such right, the homestead must be set out and determined by the proper tribunals in accordance with the statutory provisions.⁸ Nor is the mere

Homestead is the actual dwelling-place.

donment: *Carter v. Randolph*, 47 Tex. 376, 381; the constitution protects the surviving husband or wife in the right to the homestead, whether as against the heirs of the deceased, or the creditors of the survivors, so long as such survivor occupies the homestead as such: *Eubank v. Landram*, 59 Tex. 247, 248.

¹ *Ashe v. Yungst*, 65 Tex. 631, citing numerous cases, p. 636; *Fagan v. McWhirter*, 71 Tex. 567.

² *Eyres' Estate*, 7 Wash. 291.

³ The widow is liable for rent of premises occupied in excess of the homestead allowance: *Titcomb's Estate*, Myr. 55; but not otherwise, and repairs and permanent improvements will be apportioned equitably between the widow and heirs: *Engelhardt v. Yung*, 76 Ala. 531, 534.

⁴ *Vaughn v. Vaughn*, 88 Tenn. 742.

⁵ *Sassaman v. Powell*, 21 Tex. 664, 666; *David v. David*, 56 Ala. 49.

⁶ *Parisot v. Tucker*, 65 Miss. 439, 442; *In re Burdick*, 76 Cal. 639.

⁷ *Wiseman v. Parker*, 73 Miss. 378; *Hoback v. Hoback*, 33 Ark. 399; *Pettus v.*

McKinney, 56 Ala. 41; *Dexter v. Strobach*, 56 Ala. 233; *In re Crowley*, 71 Cal. 300, 305 (confining the right to the premises on which husband and wife resided when their declaration was filed); *Maloney v. Hefer*, 17 Pac. R. (Cal.) 539.

⁸ *Cameto v. Dupuy*, 47 Cal. 79, 80; *Hatorff v. Wellford*, 27 Gratt. 356, 364; *Roff v. Johnson*, 40 Ga. 555, 561. In Alabama the widow of the deceased owner of a lot and storehouse, not occupied as a dwelling, the family residing at the time of his death in a rented house, is entitled to select the storehouse as a homestead. *Hartsfield v. Harvoley*, 71 Ala. 231. By the statute of Alabama (Code, § 2544) if the homestead occupied by the family at the time of the decedent's death is mortgaged, so as to be of no value to the widow and minor children, they may select another out of other realty: *Steiner v. McDaniel*, 110 Ala. 409. So in California premises suitable for a homestead may be set apart to the widow, although theretofore solely used for business purposes: *In re Sharp*, 78 Cal. 483.

intention of the decedent to occupy a particular tract of land as a homestead, who died before such intention was carried into effect, sufficient to entitle the widow to the exemption of such tract as a homestead.¹ *A fortiori*, the widow cannot abandon the homestead occupied by the deceased and his family at the time of his death, and select another, as against the rights of creditors.² The abandonment of a homestead by the widow or minor children has been held to destroy their homestead right in the premises;³ but however proper the application of such principle may be during the lifetime of the debtor,⁴ it is necessary to observe that the temporary absence of his widow does not constitute abandonment, either by her or the minor children,⁵ and that the tendency of courts is to relax the requirement of literal occupation by the widow,⁶ and to dispense with it altogether in the case of orphan minors.⁷

Absence of widow no abandonment.

¹ *Keyes v. Bump*, 59 Vt. 391, 395; *Goodall v. Boardman*, 53 Vt. 92, 101; *Drucker v. Rosenstein*, 19 Fla. 191, 195; *Talmadge v. Talmadge*, 66 Ala. 199, 201 (the deceased was a resident of Illinois at the time of his death, and his family were denied a homestead in Alabama because the intention to acquire a domicile there was defeated by his death); or after it is sold: *Fant v. Talbot*, 81 Ky. 23. But in *Engelhardt v. Yung*, 76 Ala. 534, 541, it was held that where a house and lot was purchased with the intention and for the purpose of improving and repairing, and making it a permanent residence, the death of the purchaser before the consummation of his purpose did not prevent its being regarded as a homestead, and as such exempt from the payment of debts. And so where deeds exchanging homesteads have been executed, but actual occupancy, by one of the parties, is defeated by reason of his sickness and death, his widow may yet be entitled to her homestead rights in the intended new homestead: *Goode v. Lewis*, 118 Mo. 357.

² *Chambers v. McPhaul*, 55 Ala. 367; *Rogers v. Ragland*, 42 Tex. 422, 443 (reversing s. c. 34 Tex. 617), approved in *Hendrix v. Hendrix*, 46 Tex. 6, 8. But while she cannot do so as against the rights of the creditors before the death

of the husband, yet she may exchange the homestead derived from him for another as against her own creditors: *Schneider v. Bray*, 59 Tex. 668, 670. See *post*, § 98, as to the widow's right to alienate the homestead descended to her.

³ *Hicks v. Pepper*, 1 Baxt. 42, 45; *Carrigan v. Rowell*, 96 Tenn. 185, 190; *Kingman v. Higgins*, 100 Ill. 319, 325; *McCormack v. Kimmel*, 4 Ill. App. 121; *Farnan v. Borders*, 119 Ill. 228; *Burch v. Atchison*, 82 Ky. 585; *Paul v. Paul*, 136 Mass. 286; and a sale is an abandonment: *Garibaldi v. Jones*, 48 Ark. 230, 237. The recent statute of Alabama, providing that the widow and minor children shall not forfeit their homestead right by a removal, so long as they remain residents of the State, is held not to be retroactive; *Banks v. Speers*, 97 Ala. 560, 568.

⁴ *Thompson on Homest.* §§ 263-287.

⁵ *Carter v. Randolph*, 47 Tex. 376, 381 (where the widow had not occupied the homestead for two years after the husband's death); *Pratt v. Pratt*, 161 Mass. 276; *Titman v. Moore*, 43 Ill. 169, 173; *Franklin v. Coffee*, 18 Tex. 413, 416; *Evans v. Evans*, 13 Bush, 587; *Euper v. Alkire*, 37 Ark. 283; *Clements v. Lacy*, 51 Tex. 150; *Cox v. Harvey*, 1 Tex. Unrep. Cas. 268, 273-275.

⁶ *Locke v. Rowell*, 47 N. H. 46, 49; *Brettun v. Fox*, 100 Mass. 234, 236; *Deering v. Beard*, 48 Kans. 16; *Hufschmidt v.*

⁷ *Thomp. on Homest.*, § 242; *Booth v. Goodwin*, 29 Ark. 633, 634, and *Altheimer v. Davis*, 37 Ark. 316, both of these cases holding that minors can neither

The widow and children take the same estate which the deceased husband or father possessed in the homestead, and no greater;¹

if the estate is less than a fee, it ceases with the expiration of the term.² The mere use of the premises as a homestead has been held sufficient to shelter the possession against creditors;³ but there must be some title, right, or interest in the land upon which the homestead is claimed.⁴

Possession alone, without ownership in the land as a basis for the homestead claim, cannot be set up to defeat a recovery in ejectment under a paramount legal title;⁵ nor can the widow or minor children claim exception from the bar of limitation.⁶ An equitable title to land is held in most States sufficient to support the homestead against all the world but the * holder or beneficiary [* 201] of the legal title;⁷ while in others the right is not allowed

¹ *Smith v. Chenault*, 48 Tex. 455, 461; *McGrath v. Sinclair*, 55 Miss. 89, 93; *Deere v. Chapman*, 25 Ill. 610; *Helm v. Helm*, 30 Gratt. 404 (holding that, where a husband died without leaving children, and not having claimed a homestead, the widow is not entitled to such), 406; *Estate of Lessassier*, 34 La. An. 1066; *Baillif v. Gerhard*, 40 Minn. 172 (holding that where the homestead was abandoned the premises do not pass to the surviving husband or wife); *Howell v. Jones*, 91 Tenn. 402 (holding that the widow had no homestead in land to which her deceased husband had only a reversionary interest at his death); *Staffard v. Woods*, 144 Ill. 203 (in which it is held that anything having the legal effect of terminating the original householder's right of possession under the contract by which he obtained title terminated the homestead).

Gross, 112 Mo. 649; she may rent it out and receive the rents, and the possession of the tenant will be her possession: *Gari-baldi v. Jones*, 48 Ark. 230; *West v. McMullen*, 112 Mo. 405. So while a lease for life is generally an abandonment, this is not the case where the lessor reserves the right to return to the homestead:

waive nor abandon their homestead rights; *Johnson v. Gaylord*, 41 Iowa, 362, 367; *Hall v. Fields*, 81 Tex. 553 (in which the minor children resided with their mother, who had been divorced from decedent); *Showers v. Robinson*, 43 Mich. 502; *Farrow v. Farrow*, 13 Lea, 120, 124,

² *Brown v. Keller*, 32 Ill. 151, 154; *Weber v. Short*, 55 Ala. 311, 318 (overruling *Pizzala v. Campbell*, 46 Ala. 35, which held that a homestead right could not exist in leasehold estate).

³ *Brooks v. Hyde*, 37 Cal. 366, 372, commenting on *Calderwood v. Tevis*, 23 Cal. 335, which denies homestead protection to property wrongfully possessed; see also *Jones v. Hart*, 62 Miss. 13.

⁴ *Smith v. Smith*, 12 Cal. 216, 223; *Randal v. Elder*, 12 Kans. 257, 261; *Stamm v. Stamm*, 11 Mo. App. 598; *Berry v. Dodson*, 68 Miss. 483.

⁵ *McClurken v. McClurken*, 46 Ill. 327, 330.

⁶ *Smith v. Uzzell*, 61 Tex. 220.

⁷ *Allen v. Hawley*, 66 Ill. 164, 168; *Blue v. Blue*, 38 Ill. 9, 18; *Macmanus v. Campbell*, 37 Tex. 267; *McKee v. Wilcox*, 11 Mich. 358, 361; *Fyffe v. Beers*, 18

Gates v. Steele, 48 Ark. 539. Where, however, a portion of a tract of land is rented out before it is occupied as a homestead, the fact that the remainder is subsequently so occupied will not stamp the portion leased as a homestead: *In re Crowley*, 71 Cal. 300.

holding that occupation by the minor children at the time the right accrues is meant by the statutory requirement "occupying the same": *Rhorer v. Brockhage*, 86 Mo. 544, 548. See also *Shirack v. Shirack*, 44 Kans. 653.

to attach until the owner has the legal title.¹ Whether the homestead during the lifetime of the parents may be supported by an estate held jointly, or in common, or in partnership with others, is held differently in different States, and the authorities conflict sometimes in the same State. Homestead in tenancy in common.

The subject is exhaustively treated in Thompson's work on Homesteads and Exemptions.² But the widow and minor children have been accorded a preference in this respect over the deceased tenant in common, being entitled to a homestead out of the common estate. This was so held in Illinois,³ but denied in California.⁴ But though exclusive possession by one of several tenants in common may be held to permit of homestead rights in such tenant, yet there cannot be two separate homestead estates in the same land at the same time.⁵

In Arkansas it is held that on the death of a tenant in common the right to a homestead descends to his widow and children.⁶ In Texas the widow's right to a homestead in land owned jointly by two, who executed a deed of trust to secure a joint debt, and one of whom subsequently bought the interest of the other, was held to attach only to the interest her deceased husband owned when the deed of trust was executed.⁷

The right transmitted to the surviving members of the family is determined by the law as existing at the time of the death of the person from whom it descends; no subsequent change of the law will affect their rights.⁸ But as to creditors, it must be remembered

Law of the time of the decedent's death controls descent of homestead.

Iowa, 4, 11; *Doane v. Doane*, 46 Vt. 485, 493; *Cheatham v. Jones*, 68 N. C. 153; *Hartman v. Munch*, 21 Minn. 107; *Tarrant v. Swain*, 15 Kans. 146, 149; *McCabe v. Mazzuchelli*, 13 Wis. 478, 482. In Alabama the homestead may be claimed without regard to the nature or character of the title, whether legal or equitable, or of the estate, whether in fee, for life, or for years: *Tyler v. Jewett*, 82 Ala. 93.

¹ *Thurston v. Maddocks*, 6 Allen, 427, 428; *Holmes v. Winchester*, *infra*; *Garaty v. Du Bose*, 5 S. C. 493, 499; but later South Carolina decisions seem inclined to follow the weight of authority, and hold that there may be a homestead in land held by an equitable title: *Munro v. Jeter*, 24 S. C. 29, 36; *Ex parte Kurz*, 24 S. C. 468, 471.

² §§ 180 *et seq.* See also *Smyth*, *Homestead & Exemp.*, §§ 120 *et seq.*; *Snedecor v. Freeman*, 71 Ala. 140 *et seq.*; *Sims v. Thompson*, 39 Ark. 301, 304; *Holmes v. Winchester*, 138 Mass. 542; *Trowbridge*

v. Cross, 117 Ill. 109, denying the right of homestead in partnership property; *Capek v. Kropik*, 129 Ill. 509; *Fitzgerald v. Fernandez*, 71 Cal. 504, 507, denying homestead rights to tenants in common, or joint tenants, unless the claimant shall be in the exclusive possession of the land; *Oswald v. McCaulley*, 6 Dak. 289, vindicating homestead rights in undivided lands, on the ground that exemption may be claimed of any property subject to sale on execution: *Ward v. Mayfield*, 41 Ark. 94, citing earlier Arkansas cases.

³ *Capek v. Kropik*, *supra*; see *Brokaw v. Ogle*, 170 Ill. 115.

⁴ *Matter of Carriger*, 107 Cal. 618, reviewing earlier California cases.

⁵ *Brokaw v. Ogle*, 170 Ill. 115, and cases cited from other States in the opinion.

⁶ *Ward v. Mayfield*, *supra*.

⁷ *Griffie v. Maxey*, 58 Tex. 210.

⁸ *Register v. Hensley*, 70 Mo. 189, 194; *Yeates v. Briggs*, 95 Ill. 79, 83; *Taylor v.*

Rights of creditors not impaired after creation of the debt. that their rights cannot be impaired after the debt is contracted; so that a homestead or other exemption law is in derogation of the Constitution of the United States, in so far as it attempts to withdraw from the reach of the creditor property which was within his reach before;¹ although it was held, formerly, that a State law divesting a vested right was not for that reason unconstitutional.²

* Where the law requires a declaration of a debtor's [* 202] intention to hold certain property as a homestead to be recorded, the making and recording of such declaration by a widow, after the debtor's death, will not protect the homestead against debts contracted by the deceased husband.³ And see, on this point, the discussion of the effect of encumbrances on the homestead of widow and children.⁴

§ 96. **Homestead Rights of the Widow.**—The rights of the widow to the property constituting her homestead are to be distinguished according to the nature of her relation to the Homestead rights in property held in fee, same. If she be the owner of the property in fee, which she may occupy as the head of a family or otherwise, the law makes no distinction between her and homestead tenants in general, either as to the liability of such property for her own debts, or as to any incidents affecting her right to the same. But if the property passed to her from her deceased husband, not by devise or the law of descent, or as or in the homestead of deceased husband. dower, but by the statute, so as to be enjoyed by her as a homestead, she holds such property exempt from the claims of creditors, her late husband's as well as her own,⁵ and mostly, also, against her husband's heirs. This, as has been shown, is the law in most States,⁶ giving her the enjoyment of the homestead, whether there be a child or children or not, either for the period of her natural life, or as long as she may remain unmarried, subject to the cotenancy of minor children. It was held in Florida, however, that under a constitution securing a homestead to the *heirs* of a deceased

Taylor, 53 Ala. 135; *Munchus v. Harris*, 69 Ala. 506, 508; *Slaughter v. McBride*, 69 Ala. 510; *Emmett v. Emmett*, 14 Lea, 369, 370; *Threatt v. Moody*, 87 Tenn. 143; *Gruwell v. Seybolt*, 82 Cal. 7, 10; *Davidson v. Davis*, 86 Mo. 440. But as to the manner of asserting and contesting the right, the statute at the time governs: *Dossey v. Pitman*, 81 Ala. 381, 383.

¹ *Gunn v. Barry*, 15 Wall. 610, 621, reversing same case, 44 Ga. 351, 353; *Edwards v. Kearzey*, 96 U. S. 595; *Dunn v. Stevens*, 62 Minn. 380; *Munchus v. Harris*, *supra*; *Slaughter v. McBride*, *supra*; *Cochran v. Miller*, 74 Ala. 50, 57;

Blum v. Carter, 63 Ala. 235, 237; *De Witt v. Sewing Machine Co.*, 17 Neb. 533; *Hosford v. Wynn*, 22 S. C. 309, 310; *Davis v. Dunn*, 74 Ga. 36; *Long v. Walker*, 105 N. C. 90, 98; *White v. White*, 63 Vt. 577; *Stewart v. Blalock*, 45 S. C. 61, 65.

² *Watson v. Mercer*, 8 Pet. 88, 110; *Beers v. Haughton*, 9 Pet. 329, 359.

³ *Reinhardt v. Reinhardt*, 21 W. Va. 76, 82; *Wray v. Davenport*, 79 Va. 19, 25.

⁴ *Post*, § 100.

⁵ *Keyes v. Cyrus*, 100 Cal. 322.

⁶ *Ante*, § 94.

owner, the widow has no homestead;¹ but the present constitution extends the benefit of the homestead to the widow. If there be no children at all,² or no minor children,³ she takes the home- [* 203] stead * as the remaining constituent of the family for whose protection the law is intended. In some States, Exceptions in however, this view is not deemed warranted by the some States. language of the constitution or statute; it has been held in North Carolina that a widow is not entitled to the homestead where the husband left adult or minor children;⁴ nor where he left minor children, but no debts, the homestead law being intended to furnish protection against creditors, but not against heirs.⁵ So in Alabama,⁶ Georgia,⁷ Illinois,⁸ Michigan,⁹ Utah,¹⁰ and Virginia,¹¹ the widow is denied the right of homestead as against heirs or their assigns.¹² In Kentucky¹³ and Iowa,¹⁴ either spouse may, upon the death of the other, occupy the homestead regardless of the question which was the owner of the fee, and whether there was issue or not; and in Illinois the homestead is continued for the joint and several benefit

¹ *Wilson v. Fridenburg*, 19 Fla. 461, 466.

² *Moore v. Parker*, 13 S. C. 486, 489; *Glover v. Hill*, 57 Miss. 240, 242; *Eustache v. Rodaquest*, 11 Bush, 42, 46; *Rhorer v. Brockhage*, 13 Mo. App. 397, affirmed 86 Mo. 544; *Groover v. Brown*, 69 Ga. 60, 64; *Allen v. Russell*, 39 Oh. St. 336; *Gay v. Hanks*, 81 Ky. 552.

³ *Estate of Ballentine*, 45 Cal. 696, 699; s. c. *Myr*. 86; *Keyes v. Hill*, 30 Vt. 759, 765; *Brown v. Brown*, 68 Mo. 388; *Yoe v. Hanvey*, 25 S. C. 94, 97; *Riley v. Smith*, 5 S. W. R. (Ky.) 869; *Armstrong's Estate*, 80 Cal. 71; when the children become of full age, the widow is entitled to have the homestead set off for her exclusive use and occupancy: *Rockhey v. Rockhey*, 97 Mo. 76.

⁴ *Wharton v. Leggett*, 80 N. C. 169, 171; *Saylor v. Powell*, 90 N. C. 202. An act of the legislature extending the homestead right was held unconstitutional: *Wharton v. Taylor*, 88 N. C. 230.

⁵ *Hager v. Nixon*, 69 N. C. 108, 110. But the homestead, when once laid off, though to the widow after the husband's death, cannot be divested in favor of the heir, by the payment of the debts, but will enure to the widow's benefit during widowhood: *Tucker v. Tucker*, 103 N. C. 170.

⁶ *Thornton v. Thornton*, 45 Ala. 274.

⁷ *Kemp v. Kemp*, 42 Ga. 523, 526. (Neither widow nor children.)

⁸ *Turner v. Bennett*, 70 Ill. 263, 267; *Eggleston v. Eggleston*, 72 Ill. 24; *Sontag v. Schmisser*, 76 Ill. 541.

⁹ *Robinson v. Baker*, 47 Mich. 619; the court intimate, however, that the widow should have her dower and homestead right saved to her in the homestead land whenever it can be done consistently with justice: p. 624; *Patterson v. Patterson*, 49 Mich. 176. Neither widow nor children are entitled to the homestead right unless the estate is insolvent and in debt: *Zoellner v. Zoellner*, 53 Mich. 620; where the right attaches, and the estate is indivisible and exceeds the homestead allowance in value, it cannot be sold in partition proceedings: *Ib.*, p. 626.

¹⁰ *Knudson v. Hannberg*, 8 Utah, 203, (If the value exceeds the amount exempt from execution.)

¹¹ *Barker v. Jenkins*, 84 Va. 895.

¹² *Fight v. Holt*, 80 Ill. 84.

¹³ *Ellis v. Davis*, 90 Ky. 183.

¹⁴ *Burns v. Keas*, 21 Iowa, 257, 258; *Nicholas v. Purzell*, 21 Iowa, 265; *Dodds v. Dodds*, 26 Iowa, 311. In this State the widow is not entitled to both dower and homestead; hence, if the homestead be either sold upon the widow's application, or assigned to her in fee as dower, she occupies her own homestead, and no longer the one coming to her from her deceased husband by reason of his death: *Meyer v. Meyer*, 23 Iowa, 359, 373.

of the surviving husband or wife and of the minor children;¹ but in Missouri, if the wife be the owner and die, no homestead descends to either husband or minor children.² In Wisconsin the exemption continues after the owner's death, not only in favor of the widow and children, but of devisees also, and heirs.³

The widow may also hold the homestead property as the representative of minor children, or as having become the head of the family upon the death of her husband. In such case, whatever may be the effect of her acts upon her own rights to or interest in the homestead, she cannot waive, renounce, release, or in any manner affect the interest of the children secured to them by the statute.⁴ As against creditors,

* the right of possession is in a minor child of the deceased, [* 204] whether the mother is legally the widow or not;⁵ and where the statute does not allow dower *and* homestead in the same estate, she may either waive or hold her dower, as to herself, and claim the homestead in behalf of her children.⁶ But acting for herself alone, she may bind herself by any acts of omission or commission, in the same manner as any other person *sui juris*; she is bound in a partition proceeding, if she fail to claim her homestead, by the decree rendered, and her right to such is thereby barred.⁷

It seems hardly necessary to mention, that neither a woman not lawfully married,⁸ nor a wife who prior to her husband's death has been notoriously unfaithful to him and is not a member of his family at the time of his death,⁹ or has abandoned him,¹⁰ nor one who has been divorced,¹¹ can

No homestead rights descend to one not a member of the family.

¹ Capek v. Kropik, 129 Ill. 509, 519.

² Keyte v. Peery, 25 Mo. App. 394. This case arose under a statute construed as vesting an absolute fee in the widow to her deceased husband's homestead, before the amendment cutting down her interest therein to a life estate. The present statute does not, in terms, vest a homestead by descent in the husband: Rev. St. 1889, § 5439; but in the case of Kendall v. Powers, 96 Mo. 142, the court decide that the husband may have a homestead, as head of a family, in a life estate, or in property the title to which is vested in his wife. This case is affirmed in Richter v. Bohnsack, 144 Mo. 516, holding, however, that under the statute the husband has no homestead in his deceased wife's residence, in which he has no curtesy, and no legal or equitable, or marital interest of any kind.

³ Johnson v. Harrison, 41 Wis. 381, 385.

⁴ See authorities on this point cited, *post*, § 99, p. * 208, note.

⁵ Hence, where the deceased left one minor child, the allowance to the widow and child cannot be assailed by creditors on the ground that the alleged widow was not the lawful wife: Lockhart v. White, 18 Tex. 102, 109.

⁶ Adams v. Adams, 46 Ga. 630, 631.

⁷ Wright v. Dunning, 46 Ill. 271, 275; Hoback v. Hoback, 33 Ark. 399, 404.

⁸ Owen v. Bracket, 7 Lea, 448; and though living at the time the debt was created with the man she afterwards marries, on her premises: Rock v. Haas, 110 Ill. 528, 534.

⁹ Estate of Cometo, Myr. 42, 44; Prater v. Prater, 87 Tenn. 78, 86.

¹⁰ Dickman v. Birkhauser, 16 Neb. 686; Duke v. Reed, 64 Tex. 705, 713; nor can a husband claim a homestead in his wife's estate after abandoning her: Hector v. Knox, 63 Tex. 613.

¹¹ Stamm v. Stamm, 11 Mo. App. 598; Wiggin v. Buzzell, 58 N. H. 329, 330;

claim a homestead against the husband's real estate. But where a wife, whose husband has abandoned her, has secured a homestead under the statute providing for such case, she will be entitled to such homestead, although she subsequently obtained a divorce from her husband.¹ Nor does a wife lose her homestead rights if she leaves her home by reason of the husband's cruelty;² and in an action by her to recover lands claimed as homestead, if the defendant allege that she of her own wrong had deserted her husband, she may show that she left him because of his cruelty, although such facts were not alleged in the pleadings.³ In Kansas, where the homestead is occupied by the widow and children of decedent, her remarriage does not destroy the homestead character of the premises, and the statute provides that the homestead in such case may be divided, one-half each to the widow and children.⁴ It may also be mentioned, as was held in South Carolina,⁵ that the widow is entitled to a homestead in her husband's lands, though she and her children possess realty of their own.

But may if wife be divorced for the husband's fault.

[* 205] * Where the widow's right to a homestead is made dependent upon the existence of a family, not defined in the statute creating the right, it is difficult sometimes to determine what constitutes a family. This subject is treated in connection with the provisional alimony for the family,⁶ and the reasons and authorities given there as determining the question apply with equal force to the subject of homesteads. It is held, in this respect, that one person cannot constitute a family, nor a person and his or her children permanently separated from him or her;⁷ and that a man or woman, never having been married, or having once been married and having no family, cannot claim a homestead.⁸ But in Georgia the widow of a decedent and step-mother of his minor children, standing to them in *loco parentis*, was held to become the head of the family and entitled as such to a homestead in his realty for the benefit of herself and the minors.⁹

For the reasons mentioned in connection with the provisional

Hall v. Fields, 81 Tex. 553; even if for husband's fault: Stahl v. Stahl, 114 Ill. 375. But a divorce *a mensa et thoro* will not debar her right: Castlebury v. Maynard, 95 N. C. 281, 285.

¹ Blandy v. Asher, 72 Mo. 27, 29; so in the community property, where the wife obtains a divorce and the custody of the children, she retains a homestead during life: Tiemann v. Tiemann, 34 Tex. 522, 525. A divorced woman, if the meritorious party, and intrusted with the custody of the children, is entitled to enjoy the homestead as if she were a widow and

the head of a family: Vanzant v. Vanzant, 23 Ill. 536, 542.

² Keyes v. Scanlan, 63 Wis. 345; Lamb v. Wagan, 27 Neb. 236.

³ Bradley v. Deroche, 70 Tex. 465.

⁴ Brady v. Banto, 46 Kans. 131.

⁵ *Ex parte* Brown, 37 S. C. 181.

⁶ *Ante*, § 88.

⁷ Rock v. Haas, 110 Ill. 528, 533.

⁸ Rock v. Haas, *supra*.

⁹ Holloway v. Holloway, 86 Ga. 576, and see numerous cases there cited, p. 579.

alimony of the family¹ and in treating of the widow's right to dower,² non-resident widows or minor children can have no right to a homestead under the exemption laws of the husband's or father's domicile at the time of his death.³ But since the husband's domicile draws to it the domicile of his wife, the involuntary absence from the State, or an absence not amounting to abandonment or desertion of the husband would not, it seems, militate against her homestead rights;⁴ hence the mere fact of her never having been in the State does not debar her.⁵

§ 97. **The Homestead as affected by the Widow's Dower.**—At common law the widow is entitled to the usufruct during her life—time of one-third of all the real estate of which the Dower belongs to the widow absolutely; husband was seised during the coverture, without regard homestead to the existence of minor children, or the condition of only as representing surviving family. decedent's family.⁶ This principle is substantially embodied in the statutes of the several States. The purpose of the homestead acts is to secure a home for *the family*, including the widow within the scope of its beneficial intent only in so far as she may represent, or constitute a member of, the family. It is therefore a question whether the widow is intended to enjoy the benefit of both these provisions cumulatively, or whether her claim to or acceptance of the one excludes her interest in the other. Statutes giving homestead in addition to dower. In most of the States this question is determined by the statutes themselves; and as these differ from each other, so a different conclusion is reached in the different States by the courts called upon either to construe doubtful phraseology of statutes, or to announce the principle governing where the statutes are silent. In Alabama,⁷ Arkansas,⁸ Florida,⁹ Illinois,¹⁰ Massachusetts,¹¹

¹ *Ante*, § 89, p. *184.

² *Post*, § 108.

³ *Prater v. Prater*, 87 Tenn. 78; *Stanton v. Hitchcock*, 31 N. W. (Mich.) 395; *Alston v. Ulmann*, 39 Tex. 157, 159; *Succession of Norton*, 18 La. An. 36.

⁴ *Lacey v. Clements*, 36 Tex. 661.

⁵ *Lacey v. Clements*, *supra*.

⁶ See, as to Dower, *post*, §§ 105 *et seq.*

⁷ *McCuan v. Turrentine*, 48 Ala. 68, 70, citing earlier Alabama cases; but only as against creditors; for unless the widow prove the estate to be insolvent, she will get merely her dower: *Thornton v. Thornton*, 45 Ala. 274, 275. On the widow's abandonment of the homestead, her right to dower becomes operative: *Norton v. Norton*, 94 Ala. 481, 486.

⁸ *Horton v. Hillard*, 58 Ark. 298.

⁹ *Godwin v. King*, 31 Fla. 525.

¹⁰ *Walsh v. Reis*, 50 Ill. 477; *Bursen v. Goodspeed*, 60 Ill. 277, 281; *Jones v. Gil-*

bert, 135 Ill. 27, holding that the widow may have both dower and homestead in the same premises, but that dower cannot be asserted in the property held as homestead until the homestead ceases, when the right to have dower assigned revives; and that she cannot take homestead and also have the equivalent of dower in the whole estate taken out of the residue.

¹¹ *Cowdrey v. Cowdrey*, 131 Mass. 186, 188, citing earlier Massachusetts cases; conveyance "in order to release her rights under the homestead exemption act" does not bar her dower, although the deed contain full covenants of seisin and of warranty: *Tirrel v. Kenney*, 137 Mass. 30; but if she obtains an assignment of dower in the same land, and conveys her interest to another, she thereby waives and relinquishes her right of homestead: *Bates v. Bates*, 97 Mass. 392, 395.

Michigan,¹ Missouri,² Nebraska,³ New Hampshire,⁴ South Carolina,⁵ Tennessee,⁶ Vermont,⁷ Virginia,⁸ and Wisconsin,⁹ the right [* 206] of homestead is held to be cumulative to * and independent of dower, so that a widow may have both; while in Iowa,¹⁰ Georgia,¹¹ and North Carolina,¹² she is put to her election to take one or the other, but is not entitled to both. The wife's release of dower in an ante-nuptial contract does not affect her right to a homestead in the husband's property after his death.¹³

Statutes requiring her to elect.

§ 98. **The Widow's Right to sell the Homestead.** — Whether the widow can assign, convey, or sell her right to the homestead is a matter of some doubt, and the authorities are not harmonious. The language of the statute securing the right to the widow must be decisive, of course, and in many instances leaves no doubt in this respect; but it is not always clear enough to enable courts to reach a conclusion without recourse to construction. If the right to the homestead consists of the *mere exemption* from compulsory sale for debts, or even of a present right to possession as against heirs, it seems to result that the right ceases as soon as the owner thereof abandons the homestead, or surrenders possession to a grantee, and then the owner of the fee is entitled to possession.¹⁴ In such case a sale would pass no right whatever to

There can be no sale of a mere exemption.

¹ *Showers v. Robinson*, 43 Mich. 502, 510.

² *Gragg v. Gragg*, 65 Mo. 343, 345; *Seek v. Haynes*, 68 Mo. 13, 17. In this State, if the widow's interest in the homestead exceeds or equals in value her dower in the entire estate, then she can have no dower; if it be less, she is to have the difference set off to her in dower: *Bryan v. Rhoades*, 96 Mo. 485, 489. Under the law previous to 1875, the widow took the fee of the homestead, and she might claim it, though dower had been assigned and conveyed by her to another: *Wheelock v. Overshiner*, 110 Mo. 100.

³ *Guthman v. Guthman*, 18 Neb. 98.

⁴ *Burt v. Randlett*, 59 N. H. 130.

⁵ *Jefferies v. Allen*, 29 S. C. 501, 508.

⁶ *Merriman v. Lacefield*, 4 Heisk. 209, 222; *Jarman v. Jarman*, 4 Lea, 671.

⁷ *Chaplin v. Sawyer*, 35 Vt. 286. (In *Day v. Adams*, 42 Vt. 510, 516, it is held that on the husband's death the homestead vests in the widow in fee).

⁸ *Scott v. Cheatham*, 78 Va. 82, 83.

⁹ *Bresel v. Stiles*, 22 Wis. 120, 126.

¹⁰ Dower is abolished in Iowa; but the widow's "distributive share" takes its place: *Schlarb v. Holderbaum*, 80 Iowa,

394; *Wilcox v. Wilcox*, 89 Iowa, 388 (holding the placing of a mortgage on her distributive share to be an election and to estop her from claiming homestead, though she continued on the premises); *Zwick v. Jones*, 89 Iowa, 550 (holding the general rule to be that where the surviving husband or wife has occupied the homestead for a reasonable length of time, without having the distributive share set out, an election to take the homestead is presumed). *Hunter v. Hunter*, 95 Iowa, 728 (holding no election by estoppel where her possession of the premises may be attributed to her holding as life-tenant).

¹¹ *Adams v. Adams*, 46 Ga. 630.

¹² *Watts v. Leggett*, 66 N. C. 197, 201; but if the homestead is laid off in the lifetime of the husband, she may take dower in the remaining estate: *McAfee v. Bettis*, 72 N. C. 28, 30.

¹³ *Mack v. Heiss*, 90 Mo. 578, 582. See *Ditson v. Ditson*, 85 Iowa, 276, holding that under the facts in that case the widow could not claim homestead.

¹⁴ *McDonald v. Crandall*, 43 Ill. 231, 238; *Eldridge v. Pierce*, 90 Ill. 474, 480, citing numerous Illinois cases; *Barber v*

the vendee, because the great object of the law, to secure a fixed home for the family, would be defeated by permitting the alienation of that home.¹ It is held in Kansas, however, that a sale by the widow of the homestead before its abandonment as such confers upon the vendee the right to hold the property free from all debts of the deceased husband (except such as are not excluded by the homestead law), although the property be afterward abandoned by the widow and children.² Where the statute creates a new estate, which is given to the widow, in * derogation of the rights not only of creditors, [* 207] but also of heirs and devisees, there the enjoyment of such estate includes the power to transfer, lease, or sell it, and hence the widow's vendee or assignee takes the same title which she had.³ *A fortiori*, the right of alienation exists where the statute confers the property upon the widow in fee, or by such absolute title as the husband held before his death.⁴

A distinction has also been drawn between the debtor's voluntary exchange of exempt property for property not exempt, and such exchange for other property also exempt.⁵ Such a distinction can throw but little direct light on the subject under consideration, which is not the rights of homestead tenants in general, but of those conferred by the death of the head of a family; but is of interest in emphasizing the dual capacity in which a widow may hold homestead rights. As to the power to alienate the homestead during the lifetime of both parents of a family, see the remarks of Judge

Williams, 74 Ala. 331, 333. *A fortiori*, the homestead, if regarded as an exemption, before it is set out by metes and bounds, is not the subject of sale by a widow: Best v. Jenks, 123 Ill. 447, 459; Miller v. Schnebly, 103 Mo. 368, 377 (overruled on the ground that the statute created an estate and not merely an exemption, in Weathersford v. King, 119 Mo. 51).

¹ Garibaldi v. Jones, 48 Ark. 230, 237; Whittle v. Samuels, 54 Ga. 548, 550. It seems, however, that no one except minor children can question the validity of a widow's sale of the homestead: Drake v. Kinsell, 38 Mich. 232, 237.

² Dayton v. Donart, 22 Kans. 256, 270.

³ McCarthy v. Van der Mey, 42 Minn. 189; Eldridge v. Pierce, *supra*, distinguishing between a statute creating a new estate and one securing only an exemption: p. 480; White v. Plummer, 96 Ill. 394, 399, Mr. Justice Craig dissenting on the ground that the statute does not intend more than a mere exemption: p. 400; Plummer v. White, 101 Ill. 474. In Allens-

worth v. Kimbrough, 79 Ky. 332, the rule is stated to be that, where the homestead right is derivative, the legal title is in the heirs, subject to the right of occupancy; but where it is original, the title is in the party claiming the homestead, with the right to dispose of it as well as its proceeds. See also Holbrook v. Wightman, 31 Minn. 168, 170; Watkins v. Davis, 61 Tex. 414, 416; Graham v. Stewart, 68 Cal. 374, 378; Mack v. Heiss, 90 Mo. 578, 583; Weatherford v. King, 119 Mo. 51.

⁴ Thus it is held in Illinois, that the homestead descending to the surviving husband or wife is a freehold estate: Snell v. Snell, 123 Ill. 403, 406, which they may lease for any term not extending beyond his or her life, or convey by deed after it has been set out: White v. Plummer, 96 Ill. *supra*; Browning v. Harris, 99 Ill. 456, 463; but not before: Best v. Jenks, 123 Ill. 447, 459.

⁵ Schneider v. Bray, 59 Tex. 668, 670, citing numerous cases; Watkins v. Davis, 61 Tex. 414, 416.

Thompson in his work on Homesteads and Exemptions, which throw great light on the nature of the widow's right in this respect, and his diligently collected authorities on this point.¹

§ 99. **Homestead Rights of Minor Children.** — Children during the period of their legal infancy are the peculiar objects of the protection intended by the homestead laws; while in some of the States a widow is denied a homestead against the claims of heirs,² minor children are entitled to

Minor children entitled to homestead in all States.

such in all the States in which homestead laws exist, [* 208] * whether the father, the mother, or both parents have died.

Thus it has been held that, upon the death of a man who had acquired a plantation and lived upon it, while his wife and children lived in another State, the homestead right existed in his children, although the wife died, and neither she nor the children had ever lived upon the plantation.³ Upon the death of the owner of a homestead leaving children, some of whom are of age and one a minor, it vests alone in the minor child until its majority;⁴ and the guardian of one minor child is as much the head of a family, so as to entitle him to the homestead and exemption, as if the family embraced more than one minor child.⁵ That minor children do not lose their homestead rights in consequence of an abandonment of the premises or residence elsewhere, has already been mentioned.⁶ Touching the power of a probate or other court to order the sale of a minor's homestead interest for his support and education, the authorities are neither clear nor unanimous. The question is discussed in the author's work on Guardianship.⁷

The distinction between the personal rights of the widow as such, or considered as a *constituent member* of the family, and the authority vested in her as the *representative*, or *head*, of a family, must be kept in sight in ascertaining whether her acts in respect of the homestead are binding upon the minor children or not. Where the homestead rights are given to the children, or the widow and children, or to the family, it is obvious that no release, waiver, sale, or abandonment by the widow can deprive the children of their rights, if there be a practical necessity or occasion to assert them.⁸ Although the widow's interest in the home-

Widow cannot deprive them by her act.

¹ Thomp. on Homest., §§ 452-534.

² See *ante*, § 97.

³ Johnston v. Turner, 29 Ark. 280.

⁴ Simpson v. Wallace, 83 N. C. 477, 481, citing earlier North Carolina cases.

⁵ Rountree v. Dennard, 59 Ga. 629, 630; Little v. Woodward, 14 Bush, 585, 588; Meacham v. Edmonson, 54 Miss. 746, 749; Hudson v. Stewart, 48 Ala. 204, 206.

⁶ *Ante*, § 95.

⁷ Woerner on Guardianship, § 75, p. 250.

⁸ Miller v. Marckle, 27 Ill. 402, 405; Harmon v. Bynum, 40 Tex. 324, 326; Johnston v. Turner, 29 Ark. 280, 292; Showers v. Robinson, 43 Mich. 502, 513; Phelan v. Smith, 100 Cal. 158, 166; Hoppe v. Fountain, 104 Cal. 94; Wilson v. Fridenburg, 19 Fla. 461, 471; Shelton v. Hurst, 16 Lea, 470; Roberts v. Ware, 80 Mo. 363; Rhorer v. Brockhage, 13 Mo. App. 397, 401, 404, affirmed 86 Mo. 544. See also as to Iowa: Coulson's Estate, 95 Iowa,

stead may cease upon her marriage, yet the rights of her minor children are not thereby affected.¹ So where the husband succeeds to the homestead as tenant by the curtesy consummate, if he desert his family, it continues in favor of any minor child residing upon the premises.² In North Carolina * it has been held [* 209] that where a guardian *ad litem* failed to interpose the minor children's claim to the homestead in a proceeding by an administrator to sell the real estate of his intestate for the payment of debts, the purchaser at the administrator's sale nevertheless takes subject to the homestead rights of the children³ if timely objection be made; but not on collateral attack, after third parties have become interested.⁴

Lawful children by a former husband of a woman who lived with the decedent many years, but was not married to him, are not entitled to a homestead in decedent's lands, although he recognized them as his children in his homestead declaration, and described himself as the father of a family comprising them, but had not legally adopted them.⁵

Some curious and intricate complications involving the homestead rights of children and widows arising out of successive marriages are disposed of in the cases of *Pressley v. Robinson*⁶ and *Putnam v. Young*.⁷

696. But in Kentucky it seems that in case the homestead is devised by the testator, and his widow does not renounce the will and claim homestead, the minor children cannot claim it either: *Hazelett v. Farthing*, 94 Ky. 421. So in Tennessee the widow can abandon the homestead rights for herself and her minor children by removing to another State and acquiring a domicile there: *Corrigan v. Rowell*, 96 Tenn. 185. And so in Illinois the widow's consent to a sale of the homestead is binding upon the minor children of the deceased, and extinguishes their interests therein, except where she stands in the relation of step-mother: *Hayack v. Will*, 169 Ill. 145; but there must be an order of court: *Laggar v. Association*, 146 Ill. 283, 303. The interest of children in the homestead reserved by their mother on a sale by her as administratrix lasts only while they are minors and occupy the same: *Louden v. Martindale*, 109 Mich. 235.

¹ *Heard v. Downer*, 47 Ga. 629, 631; *In re Stile*, 117 Cal. 509; *Rogers v. Mayes*, 84 Mo. 520 (holding that ejectment would lie on behalf of the minor against his mother's vendee); see also *Brady v. Banta*, 46 Kans. 131, p. 136.

² *Laws of Ill.* 1871-72, p. 478, § 2, chan-

ging the law as held in *Wolf v. Wolf*, 67 Ill. 55, 56, that between a father and the minor children the question of homestead could not arise. It is now held that the homestead right of a minor child is paramount to the husband's curtesy: *Loeb v. McMahon*, 89 Ill. 487, 490. So in Arkansas: *Thompson v. King*, 54 Ark. 9, 11.

³ *Allen v. Shields*, 72 N. C. 504, 506. *Rodman, J.*, comments severely upon the practice of leaving the rights of minor children to the protection of a guardian *ad litem* appointed upon the suggestion of the adverse party: "Too often such an appointment is, to use the language of an old lawyer quoted by Blackstone, *committere agnum lupo*." As to the sale of realty to pay debts, when there is a homestead, see *post*, § 102.

⁴ *Morrisett v. Ferebee*, 120 N. C. 6. The facts of these cases appear to be very similar, and although different conclusions are reached by the court, the former case is not cited.

⁵ *Romers's Estate*, 75 Cal. 379. But an adopted child during minority is entitled to the exemption: *Cofer v. Scroggins*, 98 Ala. 342.

⁶ 57 Tex. 453.

⁷ 57 Tex. 461.

§ 100. **Homestead Rights of Widow and Children as affected by Encumbrances.**—The statutes of most States provide that the

homestead exemption shall not apply against debts created in the purchase or erection of the homestead, or against mortgagees under mortgages duly entered into by both husband and wife. That the homestead property is liable for the purchase-money for which the owner became indebted in acquiring it is not only just, but inevitable, since upon any other condition its acquisition would become impossible in all or most cases in which the purchaser has not sufficient means to pay the full price at once. It is equally apparent that such homestead descends to the surviving family subject to the vendor's lien, and to the claims of those who furnished money, materials, or labor for its erection.¹ And, generally, the homestead descends charged with such debts of the deceased owner as could

Homestead rights subject to vendor's lien;

to liens which were enforceable against the deceased.

have been enforced against it in his lifetime, [* 210] but discharged of any which could not have been *so enforced.² "It is the policy of our law not to exempt homesteads from sale on execution to satisfy debts contracted before the homestead was acquired."³ But it is held in Texas that a deed of trust to secure a debt does not operate as an absolute transfer of the property to which it refers, and is in legal effect but a mortgage with power of sale; that the exercise of this power must be sought, after the debtor's death, through and by aid of the court, and that such deed, whatever rights it secures to the creditor during the debtor's lifetime, after his death secures only priority over such claims against the estate as by the statute it is entitled to in the course of administration; from which it follows that funeral expenses, expenses of last sickness, expenses of administration, as well as the allowance to the widow and children in lieu of homestead and other property exempt from forced sale, are

Otherwise in some States.

¹ *Ante*, § 95; *Farmer v. Simpson*, 6 Tex. 303, 310; *Clements v. Lacy*, 51 Tex. 150, 159; *Commercial Bank v. Corbett*, 5 Sawy. 543, 547; *Fournier v. Chisholm*, 45 Mich. 417; *Palmer v. Simpson*, 69 Ga. 792, 798. And it was held, where land subject to a vendor's lien was exchanged for other land, the vendor's right, to avoid circuity of action, followed into the land thus received in exchange, unaffected by homestead rights of the vendee: *Williams v. Samuels*, 90 Ky. 59.

² *Harpending v. Wylie*, 13 Bush, 158, 162; *Rogers v. Marsh*, 73 Mo. 64, 69; *Moninger v. Ramsey*, 48 Iowa, 368; *Reinhardt v. Reinhardt*, 21 W. Va. 76, 82 (on the authority of *Speidel v. Schlosser*, 13

W. Va. 686, 701, in which it is decided that the homestead exemption dates from the time of recording a declaration to that effect by the owner, and that it will not avail against debts contracted before the recording of such declaration, in favor of either the husband, his widow, or minor children after his death); *Warhumund v. Merritt*, 60 Tex. 24, 27; *Mabry v. Harrison*, 44 Tex. 286, 294; *Douglass v. Boylston*, 69 Ga. 186, citing earlier Georgia cases; *Cook v. Roberts*, 69 Ga. 742; *Tyler v. Jewett*, 82 Ala. 93.

³ *Strong v. Garrett*, 90 Iowa, 100, 104. As to the liability of homesteads for pre-existing debts, see *ante*, § 95.

all entitled to priority over such deed of trust or mortgage, except where it represents the vendor's lien. Hence the existence of a deed of trust, although joined in by the wife, is no bar to the widow's right of homestead.¹ And in Louisiana the mortgagor of property exempt as a homestead is allowed to sell it free from the mortgage,² and to defend the homestead against the claims of a prior mortgagee.³ In Virginia the homestead exemption does not protect against a demand for damages for breach of promise to marry, on the ground that such demand is not a debt, but a *quasi* tort.⁴

The right to redeem by paying off the mortgage or paramount debt seems plainly to follow from the nature of the homestead

Right to redeem by paying off the debt.

right of widow or children;⁵ and if the administrator redeem the mortgage with assets of the estate,

* they take, without contribution, the whole [* 211] estate;⁶ but if this is not done, the widow redeeming will

stand as assignee of the mortgage until others interested shall pay their legal proportion.⁷ So it is held that the duty of contribution between widow and heir is mutual and reciprocal, and when one extinguishes a lien on the property, the other must contribute.⁸ It

Homestead right in equity of redemption,

follows that the widow and children are entitled to a homestead in the equity of redemption in the real estate against all persons except the mortgagee and his

assigns;⁹ and that if the equity of redemption is acquired by the mortgagee, the mortgage debt is to be shared between the widow and him in the proportion of the value of the mortgaged property held by each.¹⁰ If the lands are encumbered, or cannot be partitioned

¹ *McLane v. Paschal*, 47 Tex. 365, 369; *Robertson v. Paul*, 16 Tex. 472 (announcing the law as above, but allowing the creditor's demand as being a vendor's lien); *Reeves v. Petty*, 44 Tex. 249, 251 (refusing to decide the "troublesome" question as to the homestead rights against a mortgagee); *Petty v. Barrett*, 37 Tex. 84; *Blair v. Thorp*, 33 Tex. 38, 48 (approving *Robertson v. Paul*, *supra*); *Batts v. Scott*, 37 Tex. 59, 66; *Armstrong v. Moore*, 59 Tex. 646, 648; *Hall v. Fields*, 81 Tex. 553, 561. The statute now provides that the probate court shall not set aside as exempt any property upon which liens have been given by the husband and wife, or upon which vendor's liens exist, until the debts secured thereby have been discharged; and if the probate court sets aside such property, its action is invalid as against the creditor: *Fossett v. McMahon*, 86 Tex. 652.

² *Van Wickle v. Landry*, 29 La. An. 330, *Spencer, J.*, dissenting, p. 332.

³ *Fuqua v. Chaffe*, 26 La. An. 148.

⁴ *Burton v. Mill*, 78 Va. 468, 481.

⁵ *Norris v. Moulton*, 34 N. H. 392, 399.
⁶ *Ib.*

⁷ *Norris v. Morrison*, 45 N. H. 490, 501.

⁸ *Jones v. Gilbert*, 135 Ill. 27, 32. See also *McGowan v. Baldwin*, 46 Minn. 477.

⁹ *Norris v. Morrison*, *supra*; *Calmes v. McCracken*, 8 S. C. 87, 97, 100; *Homestead Association v. Ensloe*, 7 S. C. 1; *Burton v. Spiers*, 87 N. C. 87, citing earlier cases, p. 91, and holding that upon cessation of the homestead right by reason of the sale under the deed of trust, the debtor would be entitled to the exemption of any of his property to an equal value; *Raber v. Gund*, 110 Ill. 580, 589. The court may decree other lands to be sold before that on which the homestead is located: *La Rue v. Gilbert*, 18 Kans. 220, 222.

¹⁰ *Norris v. Morrison*, *supra*.

without material injury, they may be sold, and the homestead set apart out of the proceeds.¹ So if the homestead be destroyed by fire, and the administrator collect the insurance thereon, he will hold the money as trustee for the widow, creditors, and heirs, and the widow is entitled to the use of the insurance-money for life.²

A contrary view has been reached in Missouri, where it is held that the statute gives a homestead in land, but not in the proceeds of the sale of land, the court expressly disclaiming the applicability of the equitable rule of treating money as land and land as money;³ and this principle was applied by the Court of Appeals to the case of a widow, refusing her any share of the proceeds of the sale of the homestead after discharging the mortgage debt.⁴ But where the land is sold in proceeding for partition, the value of the homestead may be computed according to the Northampton tables, and the value paid to the widow and children out of the proceeds of the sale.⁵ In a subsequent case, the court distinguish between the claim to the surplus remaining after satisfying a debt out of the proceeds of sale of a homestead under a mortgage given by the owner (as denied in the case of *Casebolt v. Donaldson*) and the assertion of the homestead right in the mortgaged premises while the mortgage subsisted; holding that in such case the debtor was entitled to a homestead right in the equity of redemption.⁶

[* 212] *§ 101. **Homestead Rights as affected by Inconsistent**

Disposition of the Estate by the Deceased Owner. — The right of the surviving widow and minor children to the homestead premises is obviously paramount to that of the deceased husband or father to dispose of them; else it would be in his power to defeat the intent and purpose of these laws.⁷ Hence a testamentary disposition of the homestead estate inconsistent with the rights of the surviving members of the family is void.⁸ The homestead estate bears great resemblance to dower in this respect,

or in proceeds of insurance.

Different rule in Missouri.

Homestead rights not subject to testamentary disposition.

Principles governing dower applicable to homesteads.

¹ *Estate of McCauley*, 50 Cal. 544, 546; *Johnson v. Harrison*, 41 Wis. 381, 385; *McTaggart v. Smith*, 14 Bush. 414, 416; *Jackson v. Reid*, 32 Oh. St. 443, 446; *Merritt v. Merritt*, 97 Ill. 243, 249; *Garner v. Bond*, 61 Ala. 84, 88; *Griffin v. Maxey*, 58 Tex. 210, 216; *Swandale v. Swandale*, 25 S. C. 389. See also *Colvin v. Hauenstein*, 110 Mo. 575, 583.

² *Culbertson v. Cox*, 29 Minn. 309, 317.

³ *Casebolt v. Donaldson*, 67 Mo. 308, 312; *Woerther v. Miller*, 13 Mo. App. 567.

⁴ *Woerther v. Miller*, 13 Mo. App. 567, 570.

⁵ *Graves v. Cochran*, 68 Mo. 74, 76.

⁶ *State v. Sligo Iron Co.*, 88 Mo. 222, 227.

⁷ See *ante*, § 94; *Eaton v. Robbins*, 29 Minn. 327, 329; *Jarman v. Jarman*, 4 Lea, 671; *Rockhey v. Rockhey*, 97 Mo. 76, 78; *Kleimann v. Gieselmann*, 114 Mo. 437, 444; *Schorr v. Etling*, 124 Mo. 42, 46.

⁸ *Schneider v. Hoffmann*, 9 Mo. App. 280; *Eprason v. Wheat*, 53 Cal. 715; *In re Davis*, 69 Cal. 458; *Hall v. Fields*, 81 Tex. 553; *Bell v. Bell*, 84 Ala. 64; *Succession of Hunter*, 13 La. An. 257; *Brettun v. Fox*, 100 Mass. 234; *Valentine, J.*, in *Martindale v. Smith*, 31 Kans. 270, 273; *Brokaw v. McDougall*, 20 Fla. 212, 226; *Hendrix v. Seaborn*, 25 S. C. 481.

and many principles governing the latter are applied by analogy to the former.¹ So the widow may be compelled to elect between a testamentary provision and her right to the homestead, where the two are clearly inconsistent.² But the power to devise the homestead may be vested in the husband by statute, and he may charge such a devise with conditions, as is held to be the law in Wisconsin.³

It may be stated, also, that in most States the alienation of homesteads without the consent of both husband and wife is held unavailing to prevent them from claiming the protection of the homestead law.⁴ But where

¹ *Per* Bakewell, J., in *Daudt v. Musick*, 9 Mo. App. 169, 175; *Best v. Jenks*, 123 Ill. 447, 459, *et seq.* So the wife's right to homestead is held to be inchoate like inchoate dower, until it is assigned and set off in severalty: *Norris v. Moulton*, 34 N. H. 392, 397; *Gunnison v. Twitchell*, 38 N. H. 62, 66; *Tidd v. Quinn*, 52 N. H. 341; and when set apart in lands encumbered, the widow may require its exoneration by sale of other property to pay the debt as in case of dower assigned: *Burton v. Spiers*, 87 N. C. 87, 93.

² The widow cannot take a bequest clearly intended to be in lieu of a homestead, in addition to her statutory homestead, but must elect between the two: *McCormick v. McNeel*, 53 Tex. 15, 22; *Meech v. Meech*, 37 Vt. 414, 419; *Stunz v. Stunz*, 131 Ill. 210, 218; *Davidson v. Davis*, 86 Mo. 440 (overruled in *Kaes v. Gross*, 92 Mo. 647, 659, and in *Rockhey v. Rockhey*, 97 Mo. 76, — at least where there are minor children — on the ground that the statute negatives the husband's right to compel his widow to elect). But accepting letters testamentary under a will constituting her a legatee does not tend to show that she waived her statutory homestead, if the will does not clearly make the bequest in lieu of the homestead: *Sulzberger v. Sulzberger*, 50 Cal. 385, 387. And unless the contrary appears from the will, the presumption is, that a legacy or devise is intended as a bounty, and not as a purchase or satisfaction of homestead or statutory provisions for the wife; *McGowan v. Baldwin*, 46 Minn. 477; *Hatch's Estate*, 62 Vt. 300; *Schorr v. Etling*, 124 Mo. 42; *Stokes v. Pillow*, 64 Ark. 1. But where the homestead is a mere exemption from execution for debts there is no occasion for election

by the widow: *Aken v. Geiger*, 52 Ga. 407. Her representatives are bound by her election to take under the will: *Wills' Estate*, 63 Vt. 116.

³ *Turner v. Scheiber*, 89 Wis. 1.

⁴ *Garner v. Bond*, 61 Ala. 84, 87; *Alford v. Lehman*, 76 Ala. 526; *Thimes v. Stumpff*, 33 Kans. 53; *Barber v. Babel*, 36 Cal. 11, 15; *Goodrich v. Brown*, 63 Iowa, 247; *Ayres v. Probasco*, 14 Kans. 175, 190; *Connor v. McMurray*, 2 Allen, 202; *Amphlett v. Hibbard*, 29 Mich. 298, 304; *Hoge v. Hollister*, 2 Tenn. Ch. 606; *Rogers v. Renshaw*, 37 Tex. 625; *Hait v. Houle*, 19 Wis. 472; *Ferguson v. Mason*, 60 Wis. 377, 386; *Hall v. Harris*, 113 Ill. 410; *White v. Curd*, 86 Ky. 191, 194. In Illinois the statute was held to require the wife's joining, even where the conveyance was from the husband to the wife: *Kitterlin v. Milwaukee Ins. Co.*, 134 Ill. 647; and if the homestead so attempted to be conveyed is under \$1,000 (possession not changed or given pursuant to the deed) the conveyance is void, but if exceeding that amount the excess only passes: *Anderson v. Smith*, 159 Ill. 93. But in Virginia the husband's waiver of the homestead right is held to bind the widow: *Scott v. Cheatham*, 78 Va. 82, 87, citing *Reed v. Union Bank*, 29 Gratt. 719, which holds the wife bound by the husband's waiver. And if the wife voluntarily joins with her husband in alienating the land, she loses her homestead right, though the husband secretly intends so to reinvest the funds as to defraud her of her homestead rights; *Beck v. Beck*, 64 Iowa, 155, *Adams and Beck, JJ.*, dissenting. In some States a debtor's declaration of his intention to claim a homestead is required, the omission of which cannot be supplied by the widow's

[* 213] * a husband sells the homestead without the consent of his wife, and the wife subsequently acquires it under execution against him on a judgment for alimony, he and his vendee are estopped from claiming the homestead as exempt, as against her;¹ nor can the guardian of an insane widow, or anybody but the widow herself, waive her homestead rights.² It has been repeatedly held that neither the minor children's nor the widow's right to the homestead can be barred by an ante-nuptial contract.³ But in a late case decided in Missouri it was held that by an ante-nuptial contract mentioning a waiver of dower, but not of homestead, the widow relinquished her dower, but not her homestead rights, thus leaving the inference that a waiver or relinquishment of her homestead rights would have been deemed binding upon her.⁴ And in California, when the wife, by post-nuptial contract, "relinquishes all right as his wife, in law or equity, or by descent, and each party shall have hereafter no claim upon the other for support or sustenance," she is held not entitled to have a homestead set apart from the husband's separate property.⁵

prive wife or minor children of homestead right.

Nor, generally, a marriage contract.

An exception to the absolute right of the widow, as against a testamentary disposition of the homestead by her deceased husband, is maintained in Mississippi, where the statute is construed as giving the right to an exemptionist to dispose of the property exempted from execution by law; and it is held that such property (including the homestead) *descends* only in case of intestacy, although it is not liable to be sold for debts.⁶

§ 102. **Homestead rights as affected by Administration** — It follows from the absolute nature of homestead rights, that the homestead can in no view constitute assets in the hands of the

declaration: see *ante*, § 95, p. *202. So in Missouri a married woman who does not file her statutory notice of claim of homestead loses her homestead rights by a sale under a deed of trust executed by the husband alone: *Greer v. Major*, 114 Mo. 145, 154, overruling prior cases to the contrary.

¹ *Keyes v. Scanlan*, 63 Wis. 345.

² *Ratcliff v. Davis*, 64 Iowa, 467.

³ *McMahill v. McMahon*, 105 Ill. 596, 601, citing *McGee v. McGee*, 91 Ill. 548, 553, distinguishing between dower and homestead in this respect. See also *Phelps v. Phelps*, 72 Ill. 545, drawing a similar distinction between dower and the provisional support of the family. In Iowa it was held that the words "rights of dower and inheritance" in a marriage contract do not include homestead: *Mahaffy v. Ma-*

haffy, 63 Iowa, 55, 62. In Kansas the widow and minor children can occupy the homestead, independent of an ante-nuptial contract, until it is susceptible of partition (on the widow's remarriage or arrival at age of all the children): *Hafer v. Hafer*, 33 Kans. 449, 464; when subject to partition and distribution, however, her contract will be enforced: *Hafer v. Hafer*, 36 Kans. 524.

⁴ *Mack v. Heiss*, 90 Mo. 578, 582.

⁵ *Wickersham v. Comersford*, 96 Cal. 433.

⁶ *Norris v. Callahan*, 59 Miss. 140, 142, citing *Turner v. Turner*, 30 Miss. 428; *Nash v. Young*, 31 Miss. 134; *Kelly v. Alred*, 65 Miss. 495, giving the right to devise the homestead to the wife, from which, however, the husband may dissent and claim his distributive share.

Homestead not assets in administrator's hands. * administrator, since it vests in the widow and [* 214] children free from the husband's debts, differing in this respect even from the property allowed for the

provisional support of the family.¹ Its use is reserved to the family during the whole period of administration;² the authority of the probate court over it is limited to segregating it from that part of

the decedent's estate which is subject to administration; when that is done, its jurisdiction ceases.³ Hence a sale of the homestead by the administrator will not divest the rights of the widow and children, unless it is made to pay debts contracted before the homestead was

acquired, or any privileged debts to which it may be subject;⁴ and in such case the burden of proof that the homestead was liable for such debts is upon the purchaser.⁵ The conveyance of a homestead

Conveyance of homestead in fraud of creditors. cannot be set aside as fraudulent by a creditor, if the creditor could not subject the property to sale while in the debtor's hand.⁶ But where the reversion may

be sold, subject to the rights of the homesteaders, there may be a fraudulent conveyance of the fee, subject to the homestead exemption.⁷ Whether, and if so, under what circumstances, a minor's interest in a homestead may be sold for his support and education, is more aptly treated in connection with the subject of guardianship.⁸

In most States when the right of homestead occupancy ceases by the death of the widow and the majority of the children, the estate

Rights of creditors or heirs after homestead ceases. passes to the heirs, or becomes subject to the claims of creditors, as though no intervening homestead right had existed.⁹ If the intervention of the homestead has

¹ *Sossaman v. Powell*, 21 Tex. 664, 666, approved in *Hanks v. Crosby*, 64 Tex. 483; *Carter v. Randolph*, 47 Tex. 376, 379; *Estate of Tompkins*, 12 Cal. 114, 120; *Baker v. State*, 17 Fla. 406, 409; *Barco v. Fennell*, 24 Fla. 378.

² *O'Docherty v. McGloin*, 25 Tex. 67, 72.

³ *Estate of James*, 23 Cal. 415, 418; *Estate of Orr*, 29 Cal. 101; *Estate of Hardwick*, 59 Cal. 292; *Cummings v. Denton*, 1 Tex. Unrep. Cas. 181, 184.

⁴ *Ante*, § 95; p. * 201; *Sabalot v. Populus*, 31 La. An. 854; *Trammell v. Neal*, 1 Tex. Unrep. Cas. 51; *McCloy v. Arnett*, 47 Ark. 445, 454. She is not debarred of her right simply because she consents to the sale: *Worcester's Estate*, 60 Vt. 420, 426.

⁵ *Anthony v. Rice*, 110 Mo. 223; *Rogers v. Marsh*, 73 Mo. 64, 69; *Showers v. Robinson*, 43 Mich. 502, 507.

⁶ *Moore v. Flynn*, 135 Ill. 74, 79; *Horton v. Kelly*, 40 Minn. 193. See, also, *Myers v. Myers*, 89 Ky. 442.

⁷ Which interest may be subjected to the claims of creditors: *Schaeffer v. Beldsmeier*, 107 Mo. 314; *Miller v. Leeper*, 120 Mo. 466. But in the later case of *Bank v. Guthrey*, 127 Mo. 189, 196, these two cases are distinguished, if not overruled, it being held that during the debtor's lifetime his homestead realty cannot be sold subject to his homestead rights.

⁸ See *Woerner on the American Law of Guardianship*, § 75, p. 250.

⁹ *Lewis v. McGraw*, 19 Ill. App. 313, 316; *Chalmers v. Turnipseed*, 21 S. C. 126, 138, 140; *Booth v. Goodwin*, 29 Ark. 633, 636; *Taylor v. Thorn*, 29 Oh. St. 569, 574. So where the homestead is lost by abandonment: *Barbe v. Hyat*, 50 Kans. 86, 90.

prevented a creditor from recovering his debt, the usual rule against delay in subjecting real estate to the payment of debts does not apply.¹ In some of the States the land may at once be sold, if necessary to pay the debts, subject to the right of occupation by the widow and children;² but in others such sales are strongly objected to and promptly denied, because they tend to sacrifice the interests of all parties concerned, since "but few purchasers not venturing on a mere speculation in [* 215] * which they supposed they had much to gain and little to lose, would buy property subject to such an encumbrance."³

Right to sell for debts subject to homestead.

§ 103. **Procedure in Probate Courts in setting out the Homestead.** — Where the homestead right of the widow and children is secured to them by the statute, it vests at once upon the death of the owner, without preliminary formalities in any court.⁴ But when, for any reason, it becomes necessary to set apart the homestead from the remaining real estate of the decedent, so as to designate the particular parcel or tract to which the homestead right attaches, the proceeding may generally be had in the probate court having control of the administration of the estate.⁵ The proceeding is *in rem*, and it has been held that all parties interested are bound by it without personal notice.⁶ The judgment

Homestead vests in widow and children upon the owner's death,

and may be set out, generally, by the probate court,

¹ *Bursen v. Goodspeed*, 60 Ill. 277, 281; *Wolf v. Ogden*, 66 Ill. 224.

² *Lunsford v. Jarrett*, 2 Lea, 579; *Poland v. Vesper*, 67 Mo. 727, 729; *Hannah v. Hannah*, 109 Mo. 236; *Evans v. Evans*, 13 Bush, 587; *McCaleb v. Burnett*, 55 Miss. 83, 86; *McTaggart v. Smith*, 14 Bush, 414; *Allensworth v. Kimbrough*, 79 Ky. 332; *Barrett v. Richardson*, 76 N. C. 429, 431; *Flatt v. Stadler*, 16 Lea, 371; *McCarthy v. Vander Mey*, 42 Minn. 189 (prior to Laws, 1889, ch. 46, § 63). In Kentucky the property may be sold, but the homesteaders are entitled to the use of the proceeds: *Myers v. Myers*, 89 Ky. 442.

³ *Brickell, J.*, in *Rottenberry v. Pipes*, 53 Ala. 447; *Hinsdale v. Williams*, 75 N. C. 430; *McCloy v. Trotter*, 47 Ark. 445; *Nichols v. Shearon*, 49 Ark. 75, 82; *Slayton v. Halpern*, 50 Ark. 329; *Oettinger v. Specht*, 162 Ill. 179; *Hartman v. Schultz*, 101 Ill. 437, 443, citing earlier Illinois cases (and holding that there can be no sale where the property does not exceed the amount allowed for a homestead); *Wehrle v. Wehrle*, 39 Oh. St. 365; *Jolly v. Lofton*, 61 Ga. 154; in Michigan the right to sell lands subject to homestead

rights is doubted, but the sale cannot be impeached collaterally: *Showers v. Robinson*, 43 Mich. 502, 507; so in California the sale cannot be collaterally assailed: *Ions v. Harbison*, 112 Cal. 266.

⁴ *Skouten v. Wood*, 57 Mo. 380; *Freund v. McCall*, 73 Mo. 343, 346; *Rogers v. Marsh*, 73 Mo. 64, 69; *Wilson v. Proctor*, 28 Minn. 13, 15; until severance the widow and heirs hold as cotenants, and after sale by the administrator to pay debts, the purchaser becomes a cotenant; and if, as such, he purchase an outstanding title, he cannot deprive her of the homestead therein, but she will have the right to protect it by contributing her share of the original encumbrance: *Montague v. Selb*, 106 Ill. 49, 56.

⁵ *Coughanour v. Hoffman*, 13 Pac. R. (Idaho), 231; *McCauley's Estate*, 50 Cal. 544; *Mawson v. Mawson*, 50 Cal. 539; *Turner v. Whitten*, 40 Ala. 530; *Thompson v. Thompson*, 51 Ala. 493; *Howze v. Howze*, 2 S. C. 229, 232; *Scruggs v. Foot*, 19 S. C. 274; *French v. Stratton*, 79 Mo. 560; *Guthman v. Guthman*, 18 Neb. 98; *Cummins v. Denton*, 1 Tex. Unrep. Cas. 181, 184.

⁶ *Hanley v. Hanley*, 114 Cal. 690, 694.

of the probate court is, in cases where it has jurisdiction, final and conclusive unless directly attacked;¹ but the application may, unless or court of ordinary jurisdiction. exclusive original jurisdiction is vested in the probate court, be made in the first instance to a court of plenary jurisdiction;² and ejectment will lie to recover possession.³ So the homestead may be ascertained in a proceeding to foreclose a mortgage upon property including an unascertained homestead.⁴

* No particular formality is required to give jurisdiction [*216] to the probate court, except an inventory of the real estate, and a description of the tract or parcel of land constituting the homestead, and proof of the insolvency of the estate where the homestead right depends on such fact;⁵ and there should be a petition praying for the order.⁶ The application may be made at any time before a sale by the administrator,⁷ and even after a sale the allowance may be made,⁸ if by her acts the widow has not at any time before widow has waived or barred her right.

¹ Cannon v. Bonner, 38 Tex. 487, 491; Phelan v. Smith, 100 Cal. 158, 171; but the right of appeal is given to any person interested in the decree: Byram v. Byram, 27 Vt. 295; or to remove the proceeding to a higher court by certiorari: Connell v. Chandler, 11 Tex. 249, 252; in Massachusetts the probate court has no jurisdiction where the right is disputed by heirs or devisees: Woodward v. Lincoln, 9 Allen, 239. It is held in Alabama that the administrator represents the creditor in such a proceeding, and that hence a creditor cannot subsequently subject the homestead, so declared, to the payment of his debt: McDonald v. Berry, 90 Ala. 464. In California the court is not bound by the wishes of the applicant, but should exercise its own discretion and good judgment: *In re Schmidt*, 94 Cal. 334; in this State it is held, that where by wilful and intentional deceit the fact is concealed from the court, that by a marriage contract the widow is not entitled to a homestead, this is such fraud in the procurement of the judgment setting apart the homestead, that equity will set the same aside at the instance of an unpaid creditor: Wickersham v. Comerford, 96 Cal. 433; but *contra* where the proof is not clear that the order was obtained by some fraud in the procurement thereof; for equity will never set aside a judgment for mere error, whether of law or fact: Wickersham v. Comer-

ford, 104 Cal. 494; nor for fraud involved in the merits, or in any matter upon which the decree is rendered, but only for extrinsic fraud in the procurement: Fealey v. Fealey, 104 Cal. 354.

² Rannels v. Rannels, 27 Tex. 515, 520; Andrews v. Melton, 51 Ala. 400; Roff v. Johnson, 40 Ga. 555, 557; in Alabama the jurisdiction formerly vested in the probate court is taken away by act of April 23, 1873; Pettus v. McKinney, 56 Ala. 41. In Vermont the chancery court has jurisdiction in partition cases involving the homestead, when its severance would greatly depreciate the value of the residue, although proceedings are pending in the probate court to set out the homestead: Lindsey v. Austin, 60 Vt. 627.

³ Booth v. Goodwin, 29 Ark. 633, 637.

⁴ Coles v. Yorks, 31 Minn. 213.

⁵ Hudson v. Stewart, 48 Ala. 204, 208; Tanner v. Thomas, 71 Ala. 233; Connell v. Chandler, 11 Tex. 249. The court must act judicially upon the commissioner's report: Turnipseed v. Fitzpatrick, 75 Ala. 297; see Dossey v. Pitman, 81 Ala. 381; in California the probate court does not acquire jurisdiction unless a petition is filed: Cameto v. Dupuy, 47 Cal. 79.

⁶ Jordan v. Strickland, 42 Ala. 315; McCuan v. Turrentine, 48 Ala. 68.

⁷ Rottenberry v. Pipes, 53 Ala. 447, 450; Smith's Estate, 51 Cal. 563, 565; *Ex parte Strobel*, 2 S. C. 309, 311.

⁸ McCuan v. Turrentine, 48 Ala. 68,

waived her right, or estopped herself.¹ The proceeding in the probate court in setting apart a homestead does not affect the title by which the property is held, but is simply to withdraw, for the benefit of widow and children, certain assets exempt by law from the claim of creditors.² Where the question of the homestead right depends upon the title to the property, and objection is made in the probate court, it must be tried in another forum;³ and any person having an adverse interest may appear to defeat the application.⁴

§ 104. **The Rights and Burdens connected with the Enjoyment of the Homestead.** — The owner of a homestead interest in lands

has the right to protect the same against wrong or injury by others to the full extent of his ownership, and is entitled to be compensated in damages for any violation of such right. Thus it is held that a railroad company is liable for the damage done to a house, by the unlawful construction and use of a side track so near to the same as to cause the walls to shake and render the house unfit for a dwelling,

to the widow having the right to occupy the same as [* 217] * a homestead, although it had not been ascertained that

there were no debts of the husband for which the homestead might be liable.⁵ In another case, a railroad company was held liable for injury to the land and crops of the homestead in her possession, caused by the negligent construction of the railroad across a creek, whereby the waters of the creek were thrown back upon her lands.⁶ But an action in assumpsit will not lie for use and occupation of the homestead before the same has been set apart in a proper judicial proceeding.⁷

Together with the rights of ownership, the law also casts upon

69; *Connell v. Chandler*, 11 Tex. 249; see also *In re Still*, 117 Cal. 509; in Texas, however, the application in solvent estates must be made before the estate is ready for distribution: *Little v. Birdwell*, 27 Tex. 688, 690.

¹ *Holden v. Pinney*, 6 Cal. 234, 236.

² *Estate of Burton*, 63 Cal. 36; *Rich v. Tubbs*, 41 Cal. 34; *Schadt v. Heppe*, 45 Cal. 433, 437; *Coffey v. Joseph*, 74 Ala. 271, 273.

³ *Riggs v. Sterling*, 51 Mich. 157, 159; *Cochrane v. Sorrell*, 74 Ala. 310; *Farley v. Riordon*, 72 Ala. 128; *Estate of Chalmers*, 64 Cal. 77; *Estate of Burton*, 64 Cal. 428. Creditors holding paramount liens are not affected, and hence the probate court should assign homestead without reference to any such lien: *Jackson v. Sheffield*, 107 Ala. 358.

⁴ *McLane v. Paschal*, 62 Tex. 102, 105.

⁵ The track had in this case been laid and used more than five years before the death of the husband; but it was held that the nuisance was a continuous one, and that the widow was entitled to damages for the injury to her right of occupation: *Cain v. Chicago, R. I. & P. R. Co.*, 54 Iowa. 255, 259, 261, *et seq.*

⁶ The widow and her deceased husband had been jointly owners of the homestead, and damages were awarded to the widow in her own name for injury to the land and crops before she became the sole owner: *Railroad Company v. Knapp*, 51 Tex. 592, 599. See also *International R. Co. v. Timmermann*, 61 Tex. 660, 662.

⁷ *McCuan v. Tanner*, 54 Ala. 84.

And must also
bear the bur-
dens of
ownership.

the homestead tenant the burden of paying the taxes upon the property and the expenses of keeping it in repair. Hence the administrator will not be allowed credit in his administration account for disbursements to pay taxes and repairs of the homestead property occupied by the widow, although it had not been formally selected by or assigned to her.¹ So it was held that where the homestead is subject to a mortgage joined in by both husband and wife, the homestead life estate of the survivor is subject to and must bear its proportion of the encumbrance, in case of a deficiency of personal assets.² But the widow is not under a duty to insure against fire, to protect the heir.³

¹ *Wilson v. Proctor*, 28 Minn. 13, 15. The costs may be apportioned according to the benefits received: *Englehardt v. Yung*, 76 Ala. 534, 541. The homestead tenant has a right to the annual interest or income, nor should she be held responsible for any diminution in the corpus occasioned by the legitimate use thereof, or for loss or destruction not her fault:

Chalmers v. Turnipseed, 21 S. C. 126, 140.

² *McGowan v. Baldwin*, 46 Minn. 477. See as to the right of contribution for the discharge of encumbrances on the homestead by the widow or heirs, *ante*, § 100, p. *210.

³ *Home Ins. Co. v. Field*, 42 Ill. App. 392, 397.

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* CHAPTER XI.

ESTATES OF DOWER AND CURTESY.

§ 105. **Nature and Purpose of Dower.**—However interesting and instructive it might prove, the task of tracing to its inception the custom of setting apart for the use of the widow a portion of her husband's lands and tenements after his death lies beyond the scope of the present treatise, which must be confined, in this respect, to a brief statement of the principles upon which this form of the devolution of property rests.¹ It is important, however, to know that the motive which led to its adoption into the common law of England was the intention to provide for the sustenance of the wife and younger children at a time when the husband and father could no longer minister to their wants, and as a compensation for the inability which the common law imposed on the wife to acquire property during coverture.² The common law, in accomplishment of this purpose, provides that the widow shall have the third part of all the lands and tenements whereof the husband was seised at any time during the coverture, to hold to herself for the term of her natural life.³ The significance of this provision is, that it places the right of the widow beyond the reach of the husband, for her right attaches to "all the lands and tenements whereof the husband was seised at any time during the coverture," in which she had not freely relinquished her dower, thus protecting her and the surviving

Support of wife and her young children the original purpose of dower.

Dower at common law

secured to the widow beyond the power of the husband.

¹ Scribner, in his able work on the Law of Dower, considers the attempt to trace it to its origin a fruitless one, and cites a number of American decisions in which the judges indicate the same view: Nott, J., in *Wright v. Jennings*, 1 Bai. L. 277, 278; Lacy, J., in *Hill v. Mitchell*, 5 Ark. 608, 610; Catron, C. J., in *Combs v. Young*, 4 Yerg. 218. But he treats his readers to a very interesting chapter on this subject, referring to the current theories, and deducing from the authorities that, as all the charters coerced by the English people from the princes of the Norman line recognize dower in lands as an existing legal right, it formed one of the ancient customs of the Anglo-

Saxons, and was adopted by the Normans as one of the legal institutions of the land: 1 Scrib. on Dower, 8, 9. Blackstone says that the introduction of dower has by some been ascribed to the Normans, as a branch of their local tenures (citing *Wright*, 192), but suggests that no feudal reason can be given for its invention, for that it was first introduced in that system by the Emperor Frederick II.; and that it is possibly the relic of a Danish custom, introduced into Denmark by Swein, the father of Canute: 2 Bla. Comm. 129.

² *Banks v. Sutton*, 2 P. Wms. 700, 702; 2 Bla. Comm. 130.

³ 2 Bla. Comm. 129.

family against the caprice as well as the improvidence of the husband. The law, in its wise precaution, devised various safeguards to counteract the husband's abuse of his wife's confidence in him and prevent him from obtaining her relinquishment by undue influence.¹

The favor with which dower is regarded at the common law has by no means abated in the American States. On the contrary, the solicitude for the protection of the widow and minor children of a person dying has induced considerable extension of the right of dower in several of them, beside those provisions for the homestead and temporary support of the family, which have already been considered,² and a preference of the widow over the next of kin as heiress.³ If, possibly, the tendency of modern legislation is toward an extreme in this direction, which may encroach upon the rights of creditors,⁴ it is nevertheless satisfactory to observe the trend of public consciousness toward a recognition of the family as an organic element of the State,⁵ and the earnestness of the popular branches of State governments in its protection.

§ 106. **Dower under the Statutes of the Several States.**—The common-law rule as to the extent of the right of dower is retained in most of the States, which, by express enactment, secure to the widow the enjoyment, during the period of her life, of one-third of all the lands of which the husband was seised, or in which he had an estate of inheritance, or of which some one else was seised to his use, during the coverture, or marriage, and to which the widow had not relinquished her right of dower, or debarred herself, in the manner and for the reasons set out in the statute. In various wordings, the rule is substantially so laid down in Florida,⁶ Illinois,⁷ Kentucky,⁸ * Maine,⁹ Massachusetts,¹⁰ Michigan,¹¹ Missouri,¹² Nebraska,¹³ [* 220]

¹ Note the various statutory enactments regulating the relinquishment of dower and the rigid application of them by the courts.

² *Ante*, §§ 77 *et seq.*, 94 *et seq.*

³ *Ante*, § 67.

⁴ 1 Scrib. on Dower, eh. i. § 34, hints that others than lineal descendants have likewise claims upon the estate of the deceased by the ties of blood and the laws of nature. It seems, however, that, with the exception, perhaps, of claims to ancestral estates, no class of persons is likely to suffer from the liberality of legislatures to wife and children but creditors.

⁵ See *ante*, § 6.

⁶ Rev. St. Fla. 1892, § 1830.

⁷ St. & C. Ann. St. 1896, ch. 41. In this State tenancy by the curtesy is abol-

ished, but both husband and wife are each endowed of one-third of the lands.

⁸ St. Ky. 1894, § 2132. Surviving husband or wife entitled to one-third for life of all lands owned during coverture.

⁹ Rev. St. Me. 1883, ch. 103, § 1.

¹⁰ Publ. St. 1882, p. 740, § 3.

¹¹ 2 How. St. 1882, § 5733.

¹² Rev. St. 1889, §§ 4513 *et seq.* In 1825, the law of Missouri (repeated in 1835) subjected the widow's dower to the husband's debts. This provision was interpreted as applying only to creditors claiming payment of their just debts, who are to be preferred to the widow; and that a covenant of warranty created no debt in the sense of barring dower under the statute: *Bartlett v. Ball*, 43 S. W. R. 783, 784.

¹³ Cons. St. 1893, ch. 12, §§ 1 *et seq.*

New Jersey,¹ New York,² North Carolina,³ Ohio,⁴ Oregon,⁵ Rhode Island,⁶ Virginia,⁷ West Virginia,⁸ and Wisconsin.⁹ In some of the States the widow is entitled to different proportions, depending upon the existence or absence of lineal descendants; as in Alabama,¹⁰ Arkansas,¹¹ and Pennsylvania,¹² where the widow is entitled to dower in one-half of the lands owned by the husband at the time of his death, if he left no lineal descendants, and to one-third if there be such. In Delaware the husband must have had title or right in fee simple.¹³ In Georgia¹⁴ and New Hampshire¹⁵ she takes dower in one-third of all of the lands of which the husband died seised, or which came to him in right of his marriage; and in Georgia and Tennessee¹⁶ the dwelling-house, except in cities or towns, is not to be valued in computing the dower. In Connecticut,¹⁷ Tennessee,¹⁸ and Vermont,¹⁹ the widow takes one-third during life of all the lands of which the husband died seised. In the States of Arizona,²⁰ California,²¹ Colorado,²² Connecticut,²³ Idaho,²⁴ Indiana,²⁵ Iowa,²⁶ Kansas,²⁷ Minne-

States in which dower is affected by number of lineal descendants.

Dower in land of which husband died seised, or which came to him in right of the marriage.

Dower in land of which husband died seised.

The law abolishing dower in 1889 was held void: *Trumble v. Trumble*, 37 Neb. 340.

¹ 2 Gen. St. 1895, p. 1275, § 1.

² 2 Banks & Bro. p. 1814, § 1 (1896, 9th. ed.).

³ Code, 1883, § 2102.

⁴ Bates' Ann. St. 1897, § 4188.

⁵ Code, 1887, § 2954.

⁶ Gen. L. 1896, p. 922, § 1.

⁷ Code, 1887, § 2267.

⁸ Code, W. V. 1891, ch. 65, §§ 1-3.

⁹ Sanb. & B. Ann. St. 1889, § 2159.

¹⁰ Code, 1896, § 1505. If the estate is solvent; if insolvent, she takes only one-third, whether there are children or not.

¹¹ Dig. St. 1894, § 2520.

¹² Pepper L. Dig. 1896, p. 1677, §§ 1, 2. Expressed, in this State, to be "in lieu of dower at common law."

¹³ Bush v. Bush, 5 Del. Ch. 144, 148.

¹⁴ Code, 1895, § 4687. The dower attaches to all the lands owned during coverture and not conveyed away by him or under judicial sale during his life: *Hart v. McCollum*, 28 Ga. 478, 480; but a purchaser at sheriff's sale after his death cannot defend against the widow's dower on the ground that the husband did not

die seised of the land: *Wiece v. Marbut*, 55 Ga. 613, 614.

¹⁵ Publ. St. 1891, ch. 195, § 3.

¹⁶ *Vincent v. Vincent*, 1 Heisk. 333, 339; *Puryear v. Puryear*, 5 Baxt. 640, 642.

¹⁷ Gen. St. 1888, § 618. In case of marriages before 1877, see *infra*.

¹⁸ Code, 1884, § 3244.

¹⁹ St. 1894, § 2528.

²⁰ St. 1887, ¶ 1460, giving one-third of the personalty and a life estate in one-third of the realty to the surviving husband or wife, if the deceased leave child or children; and all the personalty and one-half of the realty if there be no child; and if there be neither child nor father or mother, then the whole of the estate by descent.

²¹ Civ. Code, § 173.

²² Ann. St. 1891, § 1524.

²³ In case of marriage after 1877: Gen. St. 1888, §§ 623, 2796.

²⁴ Rev. St. 1887, § 2506.

²⁵ 1 Burns' Ann. St. 1894, § 2639. The act making the change cannot affect existing contracts: *Wisemann v. Beckwith*, 90 Ind. 185, 188.

²⁶ Code, 1897, § 3366.

²⁷ Gen. St. 1897, ch. 109, § 26; *Crane v. Fipps*, 29 Kans. 585, 586.

States in which dower and curtesy are abolished; giving inheritance in lieu. sota,¹ Mississippi,² Nevada,³ North Dakota,⁴ South Dakota,⁵ Washington,⁶ and Wyoming,⁷ tenancy by * the curtesy and dower are abolished by [* 221] statute; in lieu whereof the husband and wife take certain shares under the Statutes of Descent and Distribution, usually more advantageous, to the widow at least, than their rights under the law of curtesy and dower.⁸ In such case the interest of the widow does not, however, extend to land owned and alienated by the husband during coverture, but is confined to that which he owned at the time of his death;⁹ and the principle protecting dower right against debts incurred during the husband's lifetime does not apply.¹⁰ In Louisiana the common-law doctrine of dower has not been adopted, but there, as well as in Texas¹¹ (in which the Spanish law prevailed until 1839, when an act "defining dowers" was passed by the Republic, but repealed on February 5th following, leaving the old law in force¹²), California,¹³ Nevada,¹⁴ and other new States,¹⁵ a species of property unknown to the common law is recognized, called community, a term applied in the French law to the title or ownership of the property of two persons who are intermarried.¹⁶ The succession of this property upon the death of either the husband or wife

¹ 2 Gen. St. 1891, § 4001.

² Ann. St. 1892, § 2291.

³ Gen. St. 1885, § 505.

⁴ Rev. Code, 1895, § 3743.

⁵ Comp. St. Dak. 1885, § 3402.

⁶ Code, 1896, §§ 2159, 5678; Richards v. Bellingham, 47 Fed. R. 854; s. c. 54 Fed. R. 209.

⁷ Code, 1887, § 2221.

⁸ See ante, §§ 66, 67.

⁹ Carr v. Brady, 64 Ind. 28, establishing also the doctrine that it is in the power of the legislature to take away an inchoate right to dower, on which point former Indiana cases are cited. But the legislature cannot impair the vested rights of a purchaser from the husband; the widow therefore has no interest in such land on the husband's death, occurring after the change in the law took effect: Taylor v. Sample, 51 Ind. 423, citing to same effect May v. Fletcher, 40 Ind. 575, and Bowen v. Preston, 48 Ind. 367, the latter case referred to as containing a collection of the authorities on this point.

In California, where "all property, acquired by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property," the entire control of which is

given to the husband with absolute power to dispose of it, and upon the death of husband or wife one-half of the common property goes to the survivor; the right of the husband to dispose of the same by will is denied: Beard v. Knox, 5 Cal. 252, 256.

¹⁰ Hanna v. Palmer, 6 Col. 156, 160.

¹¹ Rev. St. 1888, art. 1653.

¹² Dallar's Dig. 82. Husband and wife take a life estate in one-third of the property of the other spouse deceased.

¹³ Civ. Code, §§ 164, 167, 1401, 1402.

¹⁴ Gen. St. 1885, §§ 500, 509.

¹⁵ See post, § 122, on the subject of community property.

¹⁶ "The community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them both, or by purchases, or in any other similar way, even although the purchase be only in the name of one of the two, and not of both": Code La. 1870, § 2402; Clark v. Norwood, 12 La. An. 598.

excludes the application of a tenancy by either curtesy or dower. In Maryland the statute does not define dower; but it is provided that the statutes of descent shall not be construed as affecting the right *of dower;¹ consequently the right exists there as at common law.² It was so in Minnesota before the statute of 1875 abolished dower.³

§ 107. **Marriage as a Requisite to Dower.**—Marriage is self-evidently an essential prerequisite to dower. At common law marriages not solemnized *in facie ecclesiæ* are held not to confer the right of dower;⁴ the obvious reason being that the spiritual courts of England, which alone passed upon the validity of espousals at the ancient common law, refused to recognize marriages not solemnized according to the ritual of the Established Church. But as the legality of marriages does not depend, in America, upon the sanction of the church, whose authority binds only those who render a voluntary submission,⁵ it follows that all the incidents, rights, and obligations attach to a marriage recognized as valid in law, whether solemnized in church, or as a civil contract purely, or, as is sometimes the case, in both forms. Hence it may be said that, in all the States in which dower is given by law, it follows any marriage which is held to be lawful.⁶

Marriage in church indispensable to dower at common law.

Legal marriage sufficient in America.

But where a marriage is void in law, although entered into by the female in the most perfect good faith and innocence, she is nevertheless, among other harsh consequences attendant upon an unlawful connection, debarred of any dower right. The most common instances of

No dower if marriage is void in law;

[* 223] void * marriages are those in which one or both of the

¹ Hinck. Test. L. § 1264.

² Chew v. Chew, 1 Md. 163, 172.

³ Washburn v. Van Steenwyk, 32 Minn. 336, 347; Guerin v. Moore, 25 Minn. 462.

⁴ Bish. on Mar. & Div. 277 b; 1 Scrib. on Dower, ch. vi. §§ 8 *et seq.* In the case of Queen v. Millis, 10 Cl. & F. 534, upon a full discussion, a marriage between a member of the Established Church in Ireland and a Presbyterian, performed by a regularly placed minister of the Presbyterians at his residence, according to the rites of the Presbyterian church, was held insufficient to support an indictment for bigamy, after cohabitation between the couple so marrying, and one of them, during the lifetime of the other, having married some one else. The decision was rendered upon an equal division of the

Lords, under application of the rule, "*semper præsumitur pro negante.*"

⁵ Carmichael v. State, 12 Oh. St. 553, 555, citing the celebrated case of Dalrymple v. Dalrymple, 2 Hagg. Cons. R. 54, in which the law of Scotland is reviewed at great length and contrasted with the English law on this subject, and quoting from Lord Stowell (Sir William Scott) this passage: "Marriage, in its origin, is a contract of natural law; it may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind. It is the parent, not the child, of civil society. In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences."

⁶ 1 Scrib. on Dower, ch. vii. § 1.

parties have a husband or wife by a former marriage, not dissolved. In such case the woman can have no dower, for she has not been a wife.¹ In this connection, however, it must be remembered that no peculiar ceremonies are requisite, either by the common or canon law, for the valid celebration of the marriage.²

but if validated by death of former wife or husband, and continued cohabitation, dower is given. If, therefore, a man and woman, whose marriage is void because at the time of the marriage ceremony one of them had a spouse by a former undetermined marriage living, continue to cohabit and recognize each other as husband and wife after the death of such first spouse, this will either constitute, or authorize the presumption of, a valid marriage between them, after the dissolution of the former marriage by the death of the first spouse.³ The presumption of death arising upon the absence of a person for seven years, unheard from, is also relied on, in some cases, in support of marital rights, where the second marriage takes place after the expiration of this period;⁴ and courts, as a general thing, exact full and *sat- [* 224]

¹ *Higgins v. Breen*, 9 Mo. 497, 501; *Smith v. Smith*, 5 Oh. St. 32; *Smart v. Whaley*, 6 Sm. & M. 308, 312; *De France v. Johnson*, 26 Fed. Rep. 891; *Jones v. Jones*, 28 Ark. 19, 26, holding that proof of cohabitation, and holding each other out to the world as husband and wife, are not sufficient proof of marriage, where at the time the marriage is alleged to have been contracted there was a wife by a former marriage living, not divorced.

² 2 Kent Comm. *86: "The Roman lawyers strongly inculcated the doctrine that the very foundation and essence of the contract consisted in consent freely given by parties competent to contract. . . . This is the language equally of the common and canon law, and of common reason."

³ *Donnelly v. Donnelly*, 8 B. Mon. 113, 117, adjudging dower to the wife in such case. But it has since been held, in Kentucky, under a statute so providing, that all marriages are void "when not solemnized or contracted in the presence of an authorized person or society": *Estill v. Rogers*, 1 Bush, 62, 64; *Fenton v. Reed*, 4 Johns. 52. In *Smith v. Smith*, 1 Tex. 621, it was held that, under the Spanish law (before the introduction of the common law) prevalent in Texas, a marriage, though the husband might have had a former wife living, imposed upon the second wife, if ignorant of this fact,

all the obligations and invested her with all the rights of a lawful wife, so long as this ignorance continued; and that under the Spanish jurisprudence, a *putative* is converted into a *real* marriage by the removal of the disability, however that may be effected. See also *Yates v. Houston*, 3 Tex. 433, 447; *Jackson v. Claw*, 18 Johns. 346, 349; *Adams v. Adams*, 57 Miss. 267, 270, commenting on and apparently reversing *Rundle v. Pegram*, 49 Miss. 751, and *Floyd v. Calvert*, 53 Miss. 37, all arising under the Mississippi constitution, legalizing the marriage of persons not married, but cohabiting as man and wife.

⁴ *Woods v. Woods*, 2 Bay, 476, 480. The judges were unanimously of the opinion, "that the presumption of law in support of marital rights was much more favored than a presumption against them, especially when such unfavorable presumption went to bastardize the issue of a marriage apparently legal and proper." In New York the statute provides that a marriage is not void, but voidable, when entered into in good faith, though one of the parties has a living spouse, who has been absent for five years and not known to be living; but yet the second wife is held not to be entitled to dower, when her marriage is annulled by judicial decree: *Price v. Price*, 124 N. Y. 589.

isfactory proof of the first marriage, where it is sought to be interposed as a defence against the claims of the wife.¹

The consent of a free and rational person constitutes an essential ingredient of the marriage contract; hence the marriage of an idiot is void,² and the same rule prevails where either of the parties was insane at the time the marriage contract was entered into.³ That a marriage coerced by compulsion, fear, or violence, or induced by fraud or error, is voidable, rests upon the same reason;⁴ but if the party imposed upon so elects, he or she may waive the wrong and thereby render the marriage good. Voluntary cohabitation after discovery of the fraud or error, or the removal of the fear, amounts to such waiver.⁵

Marriage of idiot void.

So of an insane person;

or if coerced by force or induced by fraud.

Marriages between persons within the prohibited degrees of consanguinity or affinity, between persons of different races, or where the statutory regulations have not been observed, or either of the parties is not of the required age, &c., are also held void or voidable under the provisions of some of the State statutes, the details of which cannot be considered here.⁶ It is self-evident that, if a marriage be voidable, but not void, the wife will be entitled to dower if it be not dissolved during the lifetime of the husband.⁷

Marriages prohibited by law.

The validity of marriages is to be determined, as a general proposition, by the law of the country where it is solemnized; if valid there, it will be valid everywhere; if void there, it is void elsewhere.⁸ Exceptions recognized are polygamous and incestuous marriages;⁹ and marriages contracted elsewhere, in violation of a local law, by citizens subject to such law.¹⁰

Validity of marriage determined by law of the country where solemnized.

¹ Hull v. Rawls, 27 Miss. 471.

² 1 Scrib. on Dower, p. 123, § 17; Waymire v. Jetmore, 22 Oh. St. 271, 273.

³ Jenkins v. Jenkins, 2 Dana, 102; Crump v. Morgan, 3 Ired. Eq. 91, 94; Foster v. Means, 1 Speers Eq. 569, 574; Powell v. Powell, 18 Kans. 371, 377; Stuckey v. Mathes, 24 Hun, 461.

⁴ Bassett v. Bassett, 9 Bush, 696; Tomppert v. Tomppert, 13 Bush, 326; Willard v. Willard, 6 Baxt. 297.

⁵ Hampstead v. Plaistow, 49 N. H. 84, 98.

⁶ See 1 Washb. R. Prop. *169 *et seq.*; 1 Scrib. on Dower, chs. iii. to viii. incl.

⁷ 1 Washb. R. Prop. *169, § 2.

⁸ 1 Washb. R. Prop. *170, § 4, citing Story, Conf. of L. § 113; Clark v. Clark, 8 Cush. 385; Cambridge v. Lexington, 1

Pick. 505; Putnam v. Putnam, 8 Pick. 433. See Johnson v. Johnson, 30 Mo. 72, 88.

⁹ Story, Conf. of L. § 113 a. But only if incestuous by the law of nature: Sutton v. Warren, 10 Met. (Mass.) 451; Regina v. Chadwick, 11 Ad. & Ell. (Q. B.) n. s. 205.

¹⁰ But only if the local law expressly invalidates within the locality the marriage contracted elsewhere in violation of its provision: Brook v. Brook, 3 Sm. & G. 481; Commonwealth v. Hunt, 4 Cush. 49, 50; Putnam v. Putnam, 8 Pick. 433, 434. In many States marriages contracted by citizens of one State by going into another State for the purpose of evading the law of their domicil, and immediately returning to the State of the domicil, are held void: see Stull's Estate, 183 Pa. St. 625, citing cases *pro* and *con*.

* § 108. **Alienage as Barring the Dower Right.** — The [* 225] common-law disability of aliens to transmit or acquire lands

by descent renders them incapable of taking as tenants in dower. It is accordingly laid down as an established rule at common law, that "if a man taketh an alien to wife, and dieth, she shall not be endowed," and also, "if the husband be an alien, the wife shall not be endowed."¹ This rule is, however, rendered almost inoperative, both in England and the United States, by reason of the great changes in the law affecting the right of aliens to enjoy, acquire, and transmit property, both real and personal, by purchase, devise, and descent. This subject is treated elsewhere, in connection with the question of the power of aliens to devise real estate, to which the reader is referred. There are now but few States in which alienage continues to be a bar to the full enjoyment of real estate in all respects,² although the right is, in some of them, coupled with the condition of residence, declaration of intention to be naturalized, or claim of the property within a limited period of time. In Wisconsin the statute distinguishes between resident aliens and non-residents (whether aliens or not) in respect of dower, by limiting the right of women residing out of the State to take dower only in lands of which the husband died seised.³ In Michigan and Nebraska a similar distinction exists; and it is held in these States, that the non-residence contemplated by the statute refers not only to the time of the husband's death,⁴ but also to the time of the making of the conveyance; so that in either event she is not entitled to dower in the lands conveyed by the husband during coverture.⁵ So it is provided in Kansas, that the wife shall not be entitled to any interest in lands to which the husband has made a conveyance, if at the time of the conveyance she is not, or never has been, a resident of the State.⁶ The law of New York entitles an alien to dower "who has heretofore married, or who may hereafter marry, a citizen of the United States."⁷ Under this law it was held that an alien widow, having married an alien prior to its passage, and never having resided in this country prior to her husband's death, was not *entitled [* 226] to dower in the lands of which her husband died seised as

¹ 1 Scrib. on Dower, p. 152, § 3, citing numerous text-writers, and the case of *Fairfax v. Hunter*, which is based upon the doctrine "that an alien can take lands by purchase, though not by descent; or, in other words, he cannot take by the act of law, but he may by the act of the party:" 7 Cranch, 603, 619.

² But see *ante*, § 19, as to recent fluctuations in the law.

³ *Bennett v. Harms*, 51 Wis. 251, 254.

⁴ *Pratt v. Tefft*, 14 Mich. 191, 200.

⁵ *Ligare v. Semple*, 32 Mich. 438, 443; approved and followed in *Atkins v. Atkins*, 18 Neb. 474.

⁶ *Buffington v. Grosvenor*, 46 Kans. 730, citing the cases in the preceding notes, and holding the statute constitutional. In this State dower is abolished, but the contingent interest in the husband's realty is governed by the same principles: *ante*, § 106.

⁷ Laws, 1845, ch. 115, § 3; 3 Banks & Bro., Rev. St. 1882, p. 2170, § 3.

a citizen of the United States,¹ notwithstanding the act of Congress providing that "any woman who might lawfully be naturalized under the existing laws, married or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen of the United States."² This act is construed as applying to a woman married to a person who was *at the time of the marriage* a citizen of the United States, and that the subsequent naturalization of her husband worked no change in her status.

An Alabama case decides that the wife of an Indian is not dowerable of lands selected by her husband under the treaty between the United States and the Creek tribe, and by him sold; not, however, on account of any incapacity of the widow to take dower, but because the title of the deceased husband was such as would not support dower in his wife.³ In Tennessee the alien widow of a husband who had settled and acquired real estate there was allowed dower, but not homestead.⁴

§ 109. **Misconduct of the Wife as a Bar to her Dower.**—At common law the elopement and adultery of the wife did not operate as a bar of dower;⁵ nor would equity refuse to interfere to enforce the performance of marriage articles, though the husband might have proved that his wife is living separate from him in a state of adultery.⁶ But by the Statute of Westminster II.,⁷ if a wife elope from her husband and continue with an adulterer, she shall be barred of her dower, unless her husband willingly, and without coercion of the Church, reconcile her and suffer her to dwell with him. That the husband *consented* to the adultery, having bargained and sold the wife to the adulterer, is no defence to her.⁸ But adultery alone, without elopement from her husband, does not debar her of dower;⁹ nor elopement alone without adultery; there must be a concurrence of both elements of wrong.¹⁰ No crime committed by [* 227] * the wife, save as stated, deprives her of dower; so that even one convicted of being accessory to the murder of her

Adultery and elopement of wife bar dower under Statute of Westminster.

¹ *Burton v. Burton*, 26 How. Pr. R. 474.

² Act Feb. 10, 1855; 10 St. at Large, p. 664, § 2.

³ *Chinnubbee v. Nicks*, 3 Port. 362.

⁴ *Emmett v. Emmett*, 14 Lea, 369, 373.

⁵ 2 Scrib. on Dower, ch. xviii., § 1, citing *Hethrington v. Graham*, 6 Bing. 135, 19 Eng. C. L. 31.

⁶ *Seagrave v. Seagrave*, 13 Ves. 439, 443.

⁷ 13 Edw. I. c. 34.

⁸ Although, in an action of trespass by the husband, his license and the no-

toriously lewd character of the woman may be proved in mitigation of damages: *Coot v. Berty*, 12 Mod. 232.

⁹ *Cogswell v. Tibbetts*, 3 N. H. 41, 42.

¹⁰ *Shaffer v. Richardson*, 27 Ind. 122, 126, citing *Graham v. Law*, 6 U. C. C. P. 310, in which it was held that a woman who first deserted her husband and then lived in adultery was not thereby barred of her dower; *Wiseman v. Wiseman*, 73 Ind. 112, 113; *a fortiori*, where the husband deserts the wife, and she, believing him dead, marries another: *Payne v. Dotson*, 81 Mo. 145.

husband, and imprisoned for life, is entitled to dower in his estate.¹

The substance of the Statute of Westminster is held to be the law in some of the States, whether by re-enactment or as adopted with Statute of ancient English statutes generally; so held in Indiana,² Westminister re-enacted or Missouri,³ New Hampshire,⁴ North Carolina,⁵ South adopted in some States. Carolina,⁶ Virginia,⁷ and West Virginia.⁸ In others, Not in force the statute is held not to be in force, as in Dela- ware,⁹ Iowa,¹⁰ Massachusetts,¹¹ New York,¹² and Rhode Island.¹³

Since a woman can have dower only in the lands of a deceased husband, the question arises what are the rights of a woman who has been divorced. Lord Coke says, "*Ubi nullum matrimonium, ibi nulla dos*;"¹⁴ but he confines the maxim to divorces *a vinculo matrimonii*, and expressly excepts divorces "*a mensa et thoro* only, as for adultery." In America adultery is a sufficient ground for a divorce *a vinculo*; and if that is granted upon the husband's petition, the adultery or other misconduct of the wife for which the divorce is pronounced is thus made, generally, the ground debarring her of dower.¹⁵ This subject is regulated by statute in most of the States, the prominent tenor of which is to allow the wife her dower rights in all cases in which the divorce is granted upon her petition, and to annul it where it is granted upon the husband's petition, with discretionary power, in many instances, in the court trying the cause, to dispose of all property questions in the decree of divorce.¹⁶ It * is [* 228] self-evident that a divorce from bed and board does not defeat dower.¹⁷

Bishop, in his Commentaries on the Law of Marriage and Divorce, says: "Still, in the absence of any statutory provision, the unwritten law of our States, in general, does not recognize the status of mar-

¹ Owens v. Owens, 100 N. C. 240. The reasoning of this case has been expressly disapproved in New York and Nebraska, in considering analogous points: Riggs v. Palmer, 115 N. Y. 506; Shellenberger v. Ranson, 31 Neb. 61, 73. But this latter case was afterwards reversed on rehearing: s. c. 41 Neb. 631.

² Gaylor v. McHenry, 15 Ind. 383.

³ McAlister v. Novenger, 54 Mo. 251, 253.

⁴ Cogswell v. Tibbetts, *supra*.

⁵ Walters v. Jordan, 13 Ired. L. 361, 364.

⁶ Bell v. Nealy, 1 Bai. 312.

⁷ Stegall v. Stegall, 2 Brock. 256.

⁸ Thornburg v. Thornburg, 18 W. Va. 522, 525.

⁹ Rawlins v. Buttel, 1 Houst. 224.

¹⁰ Smith v. Woodworth, 4 Dill. 584, 587.

¹¹ Lakin v. Lakin, 2 Allen, 45.

¹² Schiffer v. Pruden, 64 N. Y. 47, 49.

¹³ Bryan v. Bacheller, 6 R. I. 543, 545.

¹⁴ Co. Litt. 32 a.

¹⁵ Moulton v. Moulton, 76 Me. 85.

¹⁶ A diligent and careful compilation of the statutory provisions on this subject in the several States, as in force in 1887, will be found in a note appended to chapter vii. of 1 Washburn on Real Property, pp. * 258 *et seq.*

¹⁷ Jarnigan v. Jarnigan, 12 Lea. 292; Taylor v. Taylor, 93 N. C. 418.

riage in a woman who has no husband. Consequently, it does not recognize in her the existence of property rights which hang directly upon the status.”¹ In accordance with this view, it has been decided that where a woman has been divorced for her misconduct, whether in Missouri or elsewhere, her rights depending on the marriage are ended in so far as they are not actually vested in her, and that evidence of the divorce may be given, although obtained in a foreign jurisdiction and without actual notice to her, in defence of her action for dower.² Where the divorce was pronounced against the husband for his misconduct,³ although in a foreign jurisdiction,⁴ the wife is, usually, under the statutes, entitled to her dower; and where, pending a proceeding for divorce by the wife, the husband in another State obtained a decree against her, it was held that, whether the foreign decree was valid or not, it could not affect her right to dower in his lands in the State of the wife’s domicile.⁵ In Alabama it was held that, while a majority of the adjudged cases and the strength of the argument lead to the conclusion that the result of a divorce from the bonds of matrimony is to bar the wife of all claim to dower in her husband’s estate,⁶ yet under the statutes of that State a divorce obtained by the husband on the ground of voluntary abandonment does not bar the surviving widow of her right of dower.⁷

But not divorce for misconduct of the husband.

[* 229] But this ruling was expressly *disavowed in a later case, announcing the doctrine that a divorced wife could under

¹ 2 Bish. Mar. & Div. § 170 c (5th ed.).

² Gould v. Crow, 57 Mo. 200, 202. The statute of Missouri provides that, “if any woman be divorced from her husband for the fault or misconduct of the husband, she shall not thereby lose her dower; but if the husband be divorced from the wife for her fault or misconduct, she shall not be endowed.” See, to same effect, Thoms v. King, 95 Tenn. 60; also Van Cleaf v. Burns, 43 Hun, 461, in which case the wife appeared in person to defend the divorce proceedings in another State. This case was, however, reversed, the court holding that the foreign judgment would not affect her dower right in New York, at least not unless it were shown that it would have that effect in the State where the judgment was rendered: s. c. 118 N. Y. 549; and in a subsequent case it was held that the effect of the divorce on lands in New York, though obtained in another State, must be determined by the law of New York, which bars dower only if she be guilty of adultery: Van Cleaf v. Burns, 133 N. Y. 540, reversing

s. c. 62 Hun, 252. In Pennsylvania the wife is not barred of dower by a divorce obtained by the husband in another State, on the ground that the court pronouncing the divorce has no jurisdiction over the wife, and that the decree is void: Real v. Elder, 62 Pa. St. 308, 315; and so in South Carolina: McCreery v. Davis, 44 S. C. 195.

³ Gordon v. Dickeson, 131 Ill. 141; Wait v. Wait, 4 N. Y. 95. In Tatro v. Tatro, 18 Neb. 395, it is held, that upon a divorce being granted the wife, a decree for alimony in gross will be presumed to be in lieu of dower. So it was held in Adams v. Storey, 135 Ill. 448, that an annuity decreed in favor of the wife, and secured by a lien on the husband’s real estate, would be in lieu of dower.

⁴ Harding v. Alden, 9 Me. 140, 146; McGill v. Deming, 44 Oh. St. 645.

⁵ Turner v. Turner, 44 Ala. 437, 450.

⁶ Per Stone, J., in Williams v. Hale, 71 Ala. 83, 85. See collection of numerous authorities by Judge Stone, p. 86.

⁷ Williams v. Hale, *supra*.

no circumstances claim dower at the death of her husband.¹ The Supreme Court of the United States announces the same doctrine in the following terms: "It has been generally held that a valid divorce from the bonds of matrimony cuts off the wife's right of dower, and the husband's tenancy by the curtesy, unless expressly or impliedly preserved by statute."² The same view is taken in Iowa,³ New Jersey,⁴ and under the statute of Kentucky.⁵

§ 110. **What Property is subject to Dower.** — It will be convenient to consider first the *class* or *kind* of property of which the widow is dowable, and next the *estate* or *degree of interest* of the husband therein necessary to support the wife's right of dower.

Dower ordinarily applies to real estate; in some States given in personalty. Dower is ordinarily understood to be applicable to real property only;⁶ in some of the States, however, the statute provides for dower in personal property, referring in some instances to the property assigned for the temporary support of the family, in analogy with the ancient custom of supporting the widow out of the estate during the period of quarantine,⁷ and in others to the distributive share allowed her by law out of the personalty. At common law the widow is dowable of all lands, tenements, or hereditaments, whether corporeal or incorporeal, of which the husband was seised of an estate of inheritance during the coverture.⁸

Mines and quarries which have been opened in the lifetime of the husband are subject to the widow's dower.⁹ But not so, in some States, unimproved lands, of which it was said that they could not be utilized by the widow without forfeiting her estate in dower, because by the principle of the common law the alteration of the property, even if it became thereby more valuable, would forfeit the estate in dower.¹⁰ But

¹ Hinson v. Bush, 4 South. (Ala.) R. 410.

² Barrett v. Failing, 111 U. S. 523, citing authorities from Massachusetts, Ohio, and other States.

³ Marvin v. Marvin, 59 Iowa, 669, approved in Boyles v. Latham, 61 Iowa, 174.

⁴ Pullen v. Pullen, 52 N. J. Eq. 9.

⁵ McKean v. Brown, 83 Ky. 208.

⁶ Dow v. Dow, 36 Me. 211, 216; Lamar v. Scott, 3 Strob. 562, 563; Davis's Estate, 36 Iowa, 24, 30; Bryant v. McCune, 49 Mo. 546.

⁷ *Infra*, p. * 230, note 1.

⁸ *Ante*, § 106; 1 Washb. on R. Prop. * 152, § 1.

⁹ Coates v. Cheever, 1 Cow. 460, 474; Billings v. Taylor, 10 Pick. 460, 462; Moore v. Rollins, 45 Me. 493; Lenfers v. Henke, 73 Ill. 405, 406; Priddy v. Griffith, 150 Ill. 560. Where such mines are

owned in common and subject to a lease, it is proper to set out to the widow for life one-third of the proceeds of her husband's share: Clift v. Clift, 87 Tenn. 17. In Michigan the widow has dower rights in the lands, irrespective of whether mines were opened before or after the husband's death, where the lands could be used for no other purpose than mining: Seager's Estate, 92 Mich. 186, 197, referring to the English cases and their origin, and emphasizing the changed conditions in America. The interest in a mining claim, prior to the payment of any money for the granting of a patent for the land, is not such an interest as will attach the locator's wife's dower rights to it against the locator's vendee: Black v. Elkhorn, 163 U. S. 445, 450.

¹⁰ Conner v. Shephard 15 Mass. 164

the reason for excluding wild lands from the widow's dower right does not extend to wild lands which were used by the husband in connection with his dwelling-house and cultivated lands, for the purpose of procuring fuel and timber for repairs.¹ And a [* 230] different * rule exists in most of the States, in which dower is allotted in *all* the lands of the husband, whether wild or cultivated.²

Shares in incorporated companies are sometimes treated as real estate, and subjected to dower.³ But, as a general rule, shares in corporations are considered as mere personal chattels,⁴ and are, as such, not dowerable as real estate.

Shares of stock in incorporated companies.

Accretion becomes a part of the land to which the alluvion attaches, and is thus an incident of the ownership of him who owns the land; hence the widow of a riparian owner is entitled to dower in such accretion.⁵

Accretions.

Crops growing upon lands assigned to the widow as her dower become her property, and she is entitled to the same as against the executor or administrator;⁶ but she is not entitled thereto before the assignment;⁷ and in Arkansas it is held that, where the husband had mortgaged the growing crop, although the wife did not join in the instrument and died before the mortgage was satisfied, it constituted no part of his property at the time of his death, and the widow was not entitled to dower therein.⁸

Crops.

In those States in which personal property is made subject to

166; *Webb v. Townsend*, 1 Pick. 21, 22; *Fuller v. Wason*, 7 N. H. 341; *Ford v. Erskine*, 50 Me. 227, 230.

¹ *White v. Willis*, 7 Pick. 143, 144; but strictly confined to the supply necessary for the occupation and enjoyment of the dwelling-house and cultivated lands assigned as dower: *White v. Cutler*, 17 Pick. 248, 251; *Shattuck v. Gragg*, 23 Pick. 88, 91; *Durham v. Angier*, 20 Me. 242, 246, citing and approving *Mosher v. Mosher*, 15 Me. 371; *Ballentine v. Poyner*, 2 Hayw. 110; *Owen v. Hyde*, 6 Yerg. 334, 339; *Fuller v. Wason*, *supra*; *Ford v. Erskine*, *supra*.

² *Macaulay v. Dismal Swamp Co.*, 2 Rob. (Va.) 507, 524; *Allen v. McCoy*, 8 Oh. 418; *Campbell*, Appellant, 2 Dougl. 141, 142; *Hickman v. Irvine*, 3 Dana, 121, 122; *Schnebly v. Schnebly*, 26 Ill. 116, 119; *Seager's Estate*, 92 Mich. 186; *Chapman v. Schroeder*, 10 Ga. 321, 325 (not questioned in *New York: Walker v. Schuyler*, 10 Wend. 480); *Has-*

tings v. Crunkleton, 3 Yeates, 261; *Brown v. Richards*, 17 N. J. Eq. 32, 38.

³ *Price v. Price*, 6 Dana, 107; *Copeland v. Copeland*, 7 Bush, 349, 352. The decision in this last case was rendered in October, 1870; in March, 1871, the legislature passed an act declaring the capital stock in all railway companies incorporated under the laws of Kentucky personal property.

⁴ 1 Washb. on R. Prop. * 166, § 22; *McDougal v. Hepburn*, 5 Fla. 568, 572.

⁵ *Lombard v. Kinzie*, 73 Ill. 446; *Gale v. Kinzie*, 80 Ill. 132.

⁶ *Ralston v. Ralston*, 3 G. Gr. (Iowa), 533; *Parker v. Parker*, 17 Pick. 236, 240 (even though the crop had been sown by the heir); *Clark v. Bottorf*, 1 Thomp. & C. 58 (although she did not claim them until after the administrators had inventoried and sold them); *Vaughn v. Vaughn*, 88 Tenn. 742.

⁷ *Budd v. Hiler*, 27 N. J. L. 43, 46.

⁸ *Street v. Saunders*, 27 Ark. 554, 556

Dower does not attach to personalty until husband's death.

the dower of the widow, a distinction is recognized between it and her dower in real estate; the former may be sold or disposed of by the husband at his pleasure, as the widow's right does not attach until his death.¹ And where the personalty, to which her dower attaches, is used by the administrator to pay debts of the deceased, she may be reimbursed out of the realty, by being subrogated to the rights of such creditor,² and the administrator has the same right of subrogation if he is compelled to refund to the widow.³ But where the deceased has pledged a chattel, the widow takes dower in the equity of redemption only.⁴

* Leasehold estates and estates for years are treated at [* 231] common law as personal property, and the widow of a lessee

No dower at common law in leaseholds.

Aliter in some States.

dying is not entitled to dower therein, although it be for a period of a thousand years,⁵ or renewable forever, or although the lease contain a covenant to convey the estate in fee on the demand of the lessee.⁶ In some of the States, however, dower is given by statute in leasehold estates of a given duration.⁷

¹ McClure v. Owens, 32 Ark. 443, 445, citing and approving Arnett v. Arnett, 14 Ark. 57. But in Arkansas she takes dower as against creditors, unless the property has actually been levied on: James v. Marcus, 18 Ark. 421, 422. In Iowa the term "dower" is held not applicable to personalty: Estate of Davis, 36 Iowa, 24, 30. In Missouri, the widow is allowed \$400 in property, to be selected by her at the appraised value, as against creditors absolutely, and this includes choses in action as well as in possession: Cummings v. Cummings, 51 Mo. 261, 264. The term "dower" is held to apply to personalty only in a qualified sense: Bryant v. McCune, 49 Mo. 546, citing and explaining Hastings v. Meyer, 21 Mo. 519; see also Hoyt v. Davis, 21 Mo. App. 235; the widow takes dower in such personal property only as the husband was owner of at the time of his death: McLaughlin v. McLaughlin, 16 Mo. 242; Crecelius v. Horst, 89 Mo. 356. And while a woman divorced from her husband for his fault is entitled to "dower," yet such dower right does not include the right to personalty, as if the husband had died: Weindel v. Weindel, 126 Mo. 640. See *ante*, § 91. In Florida the widow's right to dower in the personalty may be recovered by her personal representative, if she die before it

is allotted to her: Woodberry v. Mather-son, 19 Fla. 778, 784.

² Crouch v. Edwards, 52 Ark. 499, 502.

³ Crowley v. Mellon, 52 Ark. 1, 11.

⁴ Hewitt v. Cox, 55 Ark. 225, 236.

⁵ Goodwin v. Goodwin, 33 Conn. 314, 316. In this case the lease was for 999 years, and the widow was held not entitled to dower, although in the same State a similar leasehold was held, under a question of taxation, to be equal to a fee: Brainard v. Colchester, 31 Conn. 407, 411; Whitmire v. Wright, 22 S. C. 446, 449 (for 999 years).

⁶ Ware v. Washington, 6 Sm. & M. 737, 741; Spangler v. Stanler, 1 Md. Ch. 36. This case involved a lease for 99 years, renewable forever, and containing a covenant to make deed in fee on request.

⁷ So in Kansas, previous to the abolition of dower; in Massachusetts, in terms of one hundred years and more, so long as fifty years thereof remain unexpired: Pub. St. 1882, p. 735, § 1; Missouri, in leasehold estates of twenty years or more: Rev. St. 1889, § 4513; and it seems that in Ohio permanent leases are treated as real estate in connection with the law of descents: Northern Bank of Kentucky v. Roosa, 13 Oh. 334, 340. In Arkansas, where the widow is entitled to dower in the personalty, she takes dower absolutely

It is held in Michigan that a dower right cannot be established in land, the deed of which to the husband of the claimant was never recorded, and where the premises have passed to an innocent purchaser.¹

§ 111. **The Estate or Interest in the Property necessary to support Dower in the Widow.**—The estate of the husband must have been one of inheritance; for, it is said, as hers is

a mere continuance of the estate of the husband, if his

was less than one of inheritance it cannot extend beyond his own life.² And this whether the estate

be held for his own life, or for the life of another, and although he die before the *cestui que vie*.³ For this reason, also, there can be no dower in an estate for years,⁴ no matter how long the term is to continue.⁵ And the estate must be one

of which the husband had or might have had corporeal seisin;⁶ it is not necessary that there should have been

an actual seisin, because then it might often be in the husband's power, by neglecting to take such seisin, to deprive his wife of dower; it is enough if he had an actual seisin in law, with a right to immediate corporeal seisin.⁷ It follows, that the wife takes no dower in a reversion or remainder after a freehold estate in another,⁸ unless the husband, possessing a life estate, acquire the immediate reversion or remainder in fee expectant upon its termination.⁹ But whether she takes

dower in an estate given to the husband, by executory devise, in fee simple, but if he should die without issue, then over to another in fee, has given rise to great diversity of opinion. In the leading English case on this point it was held that the determination of an

in a lease of whatever duration, as in personal property, and not for life, as in realty: *Lenow v. Fones*, 48 Ark. 557.

¹ *Wheeler v. Smith*, 55 Mich. 355.

² 1 Washb. R. Prop. *152, § 2; *Burris v. Page*, 12 Mo. 358.

³ *Fisher v. Grimes*, 1 Sm. & M. Ch. 107, 108; *Gillis v. Brown*, 5 Cow. 388.

⁴ *Ante*, § 110, leasehold estates.

⁵ *Park* mentions a term for two thousand years: 1 Washb. R. Prop. *153, § 3. So held under a lease for 999 years in *Whitmire v. Wright*, 22 S. C. 446, 449.

⁶ *Apple v. Apple*, 1 Head, 348, 350.

⁷ *Atwood v. Atwood*, 22 Pick. 283, 286; *Mann v. Edson*, 39 Me. 25; *Dunham v. Osborn*, 1 Pai. 634; *Small v. Proctor*, 15 Mass. 495, 498; *Thompson v. Thompson*, 1 Jones L. 430; but a mere right of entry in the husband for condition broken, without more, does not en-

title the widow to dower: *Ellis v. Kygar*, 90 Mo. 600, 607.

⁸ *Brooks v. Everett*, 13 Allen, 457; *Durando v. Durando*, 23 N. Y. 331; *Fisk v. Eastman*, 5 N. H. 240, 242; *Arnold v. Arnold*, 8 B. Mon. 202, 204; *Vanleer v. Vanleer*, 3 Tenn. Ch. 23; *Gardner v. Greene*, 5 R. I. 104, 108; *Cocke v. Phillips*, 12 Leigh, 248, 257; *Warren v. Williams*, 25 Mo. App. 22. Thus there can be no dower in lands assigned as dower, the widow's intervening interest preventing the necessary seisin of the husband and heir; but where the dower of the ancestor's widow is *unassigned*, this does not prevent the vesting of the estate of inheritance in the heir, and on the latter's death his widow is entitled to dower: *Null v. Howell*, 111 Mo. 273.

⁹ *Beardslee v. Beardslee*, 5 Barb. 324, 332.

estate by operation of an executory devise does not defeat curtesy or dower.¹ This view was followed in *Pollard v. Slaughter*,² and *Nickell v. Tomlinson*,³ in which the court review the authorities and come to the conclusion that it has been generally approved and adopted in the United States.⁴ On the other hand, it is *contended that this doctrine unreasonably prolongs, by the [* 233] incidents of dower and curtesy, an estate determined by the terms of its creation;⁵ hence dower in a defeasible estate is lost when the estate is defeated.⁶

It is obvious that there can be no right of dower in estates held in joint tenancy with others, until it reaches the last survivor.⁷ But this estate is not favored in America; it was never recognized in Connecticut,⁸ and Ohio,⁹ and in most other States has been abolished, or confined to trustees, executors, and persons holding *en auter droit*, or to cases where the grant or devise expressly creates joint tenancies.¹⁰

Since there is no survivorship between coparceners, lands held in coparcenary, as well as those held in common, are subject to dower.¹¹ The rule is to set off the dower in common, unless the husband's share has been set apart to him by partition, in which case she takes dower in the portion set apart;¹² but in New Jersey she seems dowable of her husband's proportion of the whole land, notwithstanding a *parol* partition, or possession taken thereunder in severalty.¹³

¹ *Buckworth v. Thirkell*, 3 Bos. & Pull. 652 (opin. of Lord Mansfield, note, p. 655).

² 92 N. C. 72, 75.

³ 27 W. Va. 697, 706.

⁴ *Milledge v. Lamar*, 4 Desaus. 617, 637; *Northcut v. Whipp*, 12 B. Mon. 65, 73; *Evans v. Evans*, 9 Pa. St. 190; *Taliaferro v. Burwell*, 4 Call, 321, 323; *Jones v. Hughes*, 27 Gratt. 560; *Hatfield v. Sneden*, 54 N. Y. 280, 284; 1 Scrib. Dower, p. 314, § 31; 1 Washb. R. Prop. *212, pl. 32 *et seq.*; 1 Jarm. on Wills, *878.

⁵ *Weller v. Weller*, 28 Barb. 588, 592; *Edwards v. Bibb*, 54 Ala. 475, 483; 4 Kent Comm. *49, 50; Park on Dower, *166 *et seq.* (but see *189, where the writer seems to show that the authorities are against him).

⁶ *Moriarta v. McRea*, 45 Hun. 564.

⁷ *Babbitt v. Day*, 41 N. J. Eq. 392; *Mayburry v. Brien*, 15 Pet. 21, 37; *Cockrill v. Armstrong*, 31 Ark. 580, 584.

⁸ *Phelps v. Jepson*, 1 Root, 48, 49.

⁹ *Sergeant v. Steinberger*, 2 Oh. 305,

affirmed in *Miles v. Fisher*, 10 Oh. 1, 4, and *Tabler v. Wiseman*, 2 Oh. St. 207, 210.

¹⁰ As, for instance, in Missouri, where, by statute, "every interest in real estate granted or devised to two or more persons, other than executors and trustees and husband and wife, shall be a tenancy in common, unless expressly declared, in such grant or devise, to be in joint tenancy": Rev. St. 1889, § 8844. So in Arkansas: *Cockrill v. Armstrong*, 31 Ark. 580, 586; and Alabama: *Parsons v. Boyd*, 20 Ala. 112, 118.

¹¹ *Harvill v. Holloway*, 24 Ark. 19; *Davis v. Logan*, 9 Dana, 185, giving, under the Kentucky statute, the effect of tenancy in common to a joint tenancy.

¹² *Potter v. Wheeler*, 13 Mass. 504, 506; *Wilkinson v. Parish*, 3 Pai. 653, 658; *Mosher v. Mosher*, 32 Me. 412, 414; *Hart v. Burch*, 130 Ill. 426; dower may first be set out, according to valuation, and partition made afterwards: *Harris v. Coats*, 75 Ga. 415; *Clift v. Clift*, 87 Tenn. 17, 23; see *post*, § 117, as to method of assignment.

¹³ *Woodhull v. Longstreet*, 18 N. J. L.

Where a husband has during coverture made an exchange of lands, the widow is entitled to dower in both parcels, — in that which was conveyed by, as well as in that which was conveyed to, her husband, because he was seised of both during coverture,¹ — unless the exchange was

Dower in lands exchanged by the husband during coverture.

technical, a mutual grant of equal interests, the one [* 234] * in consideration of the other and in writing, in which case she takes in either of the parcels, at her election, but not in both.² This subject is regulated by statute in Arkansas,³ Illinois,⁴ Michigan,⁵ New York,⁶ Oregon,⁷ and Wisconsin.⁸ Where the statute is silent, the common-law rule is, of course, to be applied.⁹ The widow of a lunatic takes dower in lands bought by the guardian with assets of his estate, although such purchase was unauthorized.¹⁰

Real estate acquired by a firm for partnership purposes, although held in law by the several partners as tenants in common, is nevertheless liable for the partnership debts, and is in equity treated as personal property for such purpose. Hence, as a general rule, partnership property is not subject to the dower of the wives of any of the partners, except such as may remain after paying all partnership debts, whether to creditors or the partners themselves.¹¹ It is immaterial whether the title be taken in the firm name, or in the name of one of the partners.¹² In America it seems to be generally held that real estate remaining after the payment of debts, and adjustment of the equitable claims of the partners between themselves is to be treated as real estate;¹³ and since there

No dower in partnership lands.

Except in the residue after payment of partnership debts.

405, 408, Nevins, J., dissenting, 416; Lloyd v. Conover, 25 N. J. L. 47, 51.

¹ Both parties being regarded as ordinary purchasers: Cass v. Thompson, 1 N. H. 65, 67; Cruize v. Billmire, 69 Iowa, 397.

² Shep. Touch. * 294; Co. Litt. 31 b; Stevens v. Smith, 4 J. J. Marsh. 64; Mahoney v. Young, 3 Dana, 588; Stevenson v. Brasher, 90 Ky. 23.

³ Dig. of St. 1894, § 2522.

⁴ St. & C. 1896, p. 1469, ¶ 17; Hartwell v. De Vault, 159 Ill. 325.

⁵ How. St. 1882, § 5734.

⁶ 2 B. & Br. 1896 (9th ed.), p. 1814, § 3; Wilcox v. Randall, 7 Barb. 633.

⁷ Code, 1887, § 2955.

⁸ Rev. St. 1889, § 2161.

⁹ Mosher v. Mosher, 32 Me. 412, 415.

¹⁰ Rannells v. Isgrigg, 99 Mo. 19, 28.

¹¹ Campbell v. Campbell, 30 N. J. Eq. 415, 417; Uhler v. Semple, 20 N. J. Eq.

288, 294; Buchan v. Sumner, 2 Barb. Ch. 165, 200; Simpson v. Leech, 86 Ill. 286, citing Dyer v. Clark, 5 Met. 562, and Howard v. Priest, 5 Met. 582; Paige v. Paige, 71 Iowa, 318, 320.

¹² Willet v. Brown, 65 Mo. 138, 144. The seeming exception, noticed by some text-writers, of a case where the partner so holding the title had by agreement been charged by the firm as debtor for the purchase-money, is really no exception; the transaction constituted a sale of the real estate to such partner, who thus held it in his individual right; Smith v. Smith, 5 Ves. 189.

¹³ See Lenow v. Fones, 48 Ark. 557, and also Buchan v. Sumner, 2 Barb. Ch. 165, 200, for an exhaustive review of the English and American authorities on this point, reaching the conclusion stated in the text; Mowry v. Bradley, 11 R. I. 370, 372; Hiscock v. Jaycox, 12 N. Bankz

is no power to sell the firm real estate by any one of the partners, except for the payment of debts, the excess realized by a surviving partner in such a sale over the necessary amount, although distributable like personal property, devolves to the same parties who would be entitled to the real estate, and the widow of a deceased partner takes as dowress.¹ Distinctions * have been drawn [* 235] with reference to the nature of the business in which the firm engaged, allowing dower where the partners were buying and selling lands on speculation,² or determining the question according to the agreement or stipulation between the partners,³ and holding that in the absence of an *express* agreement stipulating that lands acquired by the partners shall be applied in the payment of partnership debts;⁴ but these cases are in conflict with the current of authorities, and of no weight. So it has been held in Virginia, contrary to the tenor of American decisions generally, that real estate of a partnership used for partnership purposes is, in equity, personal property for all purposes, and on the death of any of the partners goes to his personal representative.⁵

There can be no dower in the estate of a trustee, although he holds the legal seisin and estate, because the trustee has no beneficial interest in the trust;⁶ nor was dower allowed in England before the Dower Act⁷ in the estate of a *cestui que trust*, or in an equity of redemption.⁸ In the United States the law as to dower in equitable estates is not uniform. Seisin of the legal estate is required in Florida,⁹ Georgia,¹⁰ Maine,¹¹

Reg. 507, 517. For further authorities see *post*, § 126.

¹ Foster's Appeal, 74 Pa. St. 391, 397.

² Markham v. Merrett, 7 How. (Miss.) 437, 445. But the court seemed to rest its decision on the ground that the sales were made rather as tenants in common than as partners. It is generally held that where realty is bought by a firm speculating in real estate as a business, it is regarded as personalty for all partnership purposes; and when the partnership affairs have been fully settled, then only the real estate resumes its legal characteristics; and even then it has, in some cases, been treated as personalty: see *post*, § 126 (last note of §).

³ Greene v. Greene, 1 Oh. 535, 542; Hawley v. James, 5 Pai. 318, 454, *et seq.*; Wheatley v. Calhoun, 12 Leigh, 264, 272.

⁴ Smith v. Jackson, 2 Edw. Ch. 28, 35; Bell v. Phyn, 7 Ves. 453.

⁵ Pierce v. Trigg, 10 Leigh, 406, 422; cited approvingly in Parrish v. Parrish, 68 Va. 529, 532.

⁶ Hopkinson v. Dumas, 42 N. H. 296, 306; Chestnut v. Chestnut, 15 Ill. App. 442, 449; King v. Bushnell, 121 Ill. 656.

⁷ 3 & 4 Wm. IV. c. 105.

⁸ See 1 Washb. R. Prop. *160 *et seq.*, showing the distinction in this respect between the right of curtesy and dower in equitable estates, and a brief account of the history of dower in equitable estates.

⁹ Laws, 1881, p. 475, § 1. But mortgages are held not to be present conveyances, and the widow has her dower in the mortgaged premises, except as to the mortgage debt: McMahon v. Russell, 17 Fla. 698, 703.

¹⁰ Code, 1882, § 1763; Bowen v. Collins, 15 Ga. 100; Latham v. McLain, 64 Ga. 320. In 1884 dower was granted in lands held under deed, bond for title, or other instrument, where a portion of the purchase-money has been paid, the estate in dower being liable for its proportion of the unpaid purchase-money: Code, 1895, § 4688.

¹¹ Rev. St. 1883, p. 812; 1 Scrib. on Dower, 414, § 4.

Massachusetts,¹ Michigan,² New Hampshire,³ [*236] Oregon,⁴ Vermont,⁵ and Wisconsin; ⁶ while *an estate of inheritance, legal or equitable, is held sufficient in Alabama,⁷ Arkansas,⁸ Connecticut,⁹ Delaware,¹⁰ Illinois,¹¹ Kentucky,¹² Maryland,¹³ Missouri,¹⁴ New Jersey,¹⁵ New York,¹⁶ North Carolina,¹⁷ Ohio,¹⁸ Pennsylvania,¹⁹ Rhode Island,²⁰ South Carolina,²¹ Tennessee,²² Virginia,²³ and West Virginia.²⁴ But if there be a conveyance by the husband of a merely equitable estate during the coverture, dower is generally defeated thereby, whether the conveyance was absolute,²⁵ or by way of mortgage.²⁶

Different rules as to equitable estates.

¹ Pub. St. 1882, p. 740, § 3. But property held under a defective description is subject to the wife's dower: *Hale v. Munn*, 4 Gray, 132, 136; so also land recovered in an action for specific performance of a contract of sale: *Reed v. Whitney*, 7 Gray, 533, 537.

² How. St. 1882, § 5733; *May v. Rumney*, 1 Mich. 1.

³ Pub. St. 1891, p. 546; *Hopkinson v. Dumas*, 42 N. H. 296, 305.

⁴ *Whiteaker v. Vanschoiack*, 5 Oreg. 113, 118.

⁵ St. Vt. 1894, § 2528; *Dummerston v. Newfane*, 37 Vt. 9, 13. But the widow has dower in the equity of redemption of lands mortgaged by her husband: § 2529.

⁶ St. 1898, § 2159, p. 1583. The widow takes dower in an equity of redemption to land encumbered before coverture, except as against the mortgagee: St. 1898, § 2162; 1 Scrib. on D. 414, § 4.

⁷ Code, 1896, § 1504.

⁸ *Kirby v. Vantrece*, 26 Ark. 368, 370.

⁹ *Fish v. Fish*, 1 Conn. 559, construing a statute substantially the same as the provision in Gen. St. 1875, p. 376, § 1.

¹⁰ But only in intestate estates: *Cornog v. Cornog*, 3 Del. Ch. 407, 415; *Gemmill v. Richardson*, 4 Del. Ch. 599; *Bush v. Bush*, 5 Houst. 245, 264.

¹¹ *Starr & C. St.* 1896, p. 1457, ¶ 1; *Sisk v. Smith*, 6 Ill. 503, 513; *Nicoll v. Todd*, 70 Ill. 295.

¹² *Harrow v. Johnson*, 3 Metc. (Ky.) 578, 581; *Harrison v. Griffith*, 4 Bush, 146, 148. The language of the statute gives the surviving husband or wife "an estate for life in one-third of all the real estate of which he or she or any one for his or her use was seized of an estate in fee simple during the coverture." &c.: St. 1894, § 2132.

¹³ Pub. Gen. L. 1888, ch. 45, § 5.

¹⁴ *Duke v. Brandt*, 51 Mo. 221, 224; *Hart v. Logan*, 49 Mo. 47.

¹⁵ *Yeo v. Mercereau*, 18 N. J. L. 387, 390; *Cushing v. Blake*, 30 N. J. Eq. 689, 695; *Skellenger v. Skellenger*, 32 N. J. Eq. 659.

¹⁶ 2 Banks & B. (1896, 9th ed.) p. 1814, § 1; *Hawley v. James*, 5 Paige, 318, 452, *et seq.*; *in re Ransom*, 17 Fed. R. 331, 333. The widow has no dower in lands bought with the husband's money, but not conveyed nor agreed to be conveyed to him: *Phelps v. Phelps*, 143 N. Y. 197.

¹⁷ Code, 1883, § 2102; it seems the equitable estate must be such as a court of equity can enforce: *Efland v. Efland*, 96 N. C. 488, 493.

¹⁸ *Rands v. Kendall*, 15 Oh. 671; followed in *Abbott v. Bosworth*, 36 Oh. St. 605, 608; *Laws*, Oh. 1890, § 4188.

¹⁹ *Shoemaker v. Walker*, 2 S. & R. 554.

²⁰ Gen. L. 1896, p. 922, § 1; 1 Scrib. Dower, 421, § 11.

²¹ *Bowman v. Bailey*, 20 S. C. 550, 554; *Rev. St.* 1893, § 1905. But the husband must have been in a position to demand the legal title, it seems: *Morgan v. Smith*, 25 S. C. 337, 339.

²² Code, 1884, § 3244; *Martin v. Lincoln*, 4 Lea, 289.

²³ Code, 1887, § 2267. The equitable estate must be such that the legal estate might have been decreed: *Rowton v. Rowton*, 1 Hen. & M. 91; *Wheatley v. Calhoun*, 12 Leigh, 264.

²⁴ Code, 1891, ch. 65, § 3.

²⁵ *Hawley v. James*, 5 Pai. 318, 453; *Heed v. Ford*, 16 B. Mon. 114, 117; *Junk v. Canon*, 34 Pa. St. 286; *Wheatley v. Calhoun*, 12 Leigh, 264, 274.

²⁶ *Miller v. Stump*, 3 Gill, 304, 310; *Purdy v. Purdy*, 3 Md. Ch. 547, 550;

There is, at common law, no dower in mortgaged estates, because there is no seisin in the husband,¹ except where the mortgage is for years, and not in fee, because in such case there is a legal reversion to which it attaches upon redemption.² In the United States, however, the wife is held dowable of equities of redemption existing at the husband's death,³ whether the estate was mortgaged by the husband before, or by the husband and wife * during coverture;⁴ and she may redeem the land [* 237] from existing encumbrance in protection of her right to dower therein,⁵ but whether she can require the personal representative to apply the personalty in relief of encumbrances for the benefit of her dower, has been differently held.⁶ The release of dower, where the wife joins in the mortgage, is a release in favor of the mortgagee only, and only to the extent of the debt secured by the mortgage;⁷ she is not bound by the covenants in the deed,⁸ and while a sale of the mortgaged premises during the husband's lifetime is in some States allowed to defeat the wife's inchoate dower

Glenn v. Clark, 53 Md. 580, 604; Morse v. Thorsell, 78 Ill. 600.

¹ Worsham v. Callison, 49 Mo. 206, 207; 1 Scrib. Dower, 463, pl. 1.

² 1 Scrib. 476, pl. 21.

³ 4 Kent, * 45; Scribner mentions twenty-eight States as so holding, omitting only California, Colorado, Delaware, Florida, Louisiana, Nebraska, Nevada, New Jersey, Texas, and West Virginia. In Connecticut the widow may have dower assigned in one unencumbered piece of real estate, if some of several pieces are encumbered; and if some are encumbered beyond their value, the excess is not to be taken out of the values of the other pieces, but such pieces are to be disregarded as of no value: Platt's Appeal, 56 Conn. 572. In the District of Columbia a widow is not dowable of an equity of redemption: *In re Thompson*, 6 Mackey, 536. In North Carolina, when the lands consist of several parcels mortgaged in several deeds of trust, dower should be assigned in each piece separately, and then the widow can assert against each creditor the right to have the remaining two-thirds and the reversion in the one-third covered by her dower first subjected to the payment of the mortgage debt: Askew v. Askew, 103 N. C. 285. For a statement of the law in South Carolina, (1) where there is an encumbrance on the land at the time of coverture, and a judicial sale to satisfy

such encumbrance during coverture; (2) where the land before and during coverture is clear, and the husband put a mortgage upon it; (3) where the wife joins in such a mortgage; (4) where the land is sold under such mortgage; and (5) where a wife renounces dower in one mortgage, and there are other mortgages, under all of which the land is sold during coverture, see *Miller v. Farmers' Bank*, 27 S. E. (S. C.) 514.

⁴ 1 Washb. R. Prop. bk. 1, ch. vii. § 2, pl. 17; 1 Scrib. 467, pl. 8 *et seq.*; *Turbeville v. Gibson*, 5 Heisk. 565, 586, 602.

⁵ Kissel v. Eaton, 64 Ind. 248, 249; *McMahon v. Russell*, 17 Fla. 698, 705, citing numerous authorities; 4 Kent, * 162; 1 Scrib. 481 *et seq.*, with numerous authorities; *Kauffman v. Peacock*, 115 Ill. 212, 216; *Newhall v. Lynn*, 101 Mass. 428, 431.

⁶ *Hewitt v. Cox*, 55 Ark. 225, 231, citing cases *pro* and *con*.

⁷ *Blain v. Harrison*, 11 Ill. 384, 387; *Smith v. Eustis*, 7 Me. 41, 43; *Ridgway v. Masting*, 23 Oh. St. 294, 296; unless otherwise expressed in the instrument: *Genobles v. West*, 23 S. C. 154, 168; the wife having joined in a deed or mortgage which is subsequently avoided, or ceases to operate, she is restored to her original position: *Hinchliffe v. Shea*, 103 N. Y. 153.

⁸ *Carry v. Am. M. Co.*, 107 Ala. 429.

by treating the surplus as personal property to which dower does not attach,¹ it is unquestioned, even in the States so holding, that she takes dower in the surplus where the sale takes place after the husband's death.² A sale by the husband of the equity of redemption, in which sale the wife had not joined, does not affect her right to redeem.³

The lien of a vendor for the purchase-money of the land is obviously superior to the dower right of the purchaser's widow.⁴ The lien is good against her whether a mortgage has been executed to secure the purchase-money or not, and, *a fortiori*, whether she joined therein or executed the same under circumstances making her act binding or not.⁵ The statute of Iowa provides that the vendor's lien shall not be recognized after a conveyance by the vendee, unless reserved by conveyance or other instrument duly recorded. Under this statute

it was held that a contract for the sale by the vendee is [* 238] * not such a conveyance as will defeat the vendor's lien.⁶

The right of the vendor, however, is personal to him, and does not pass to his assignee by the simple indorsement of the note to, or payment of the debt by, a third person, unless the lien was reserved on the face of the deed;⁷ and, if lost by the acceptance of independent security, can only be revived by act of the vendee.⁸ The widow is entitled to her dower in the land after discharge of the lien, or in the surplus after a sale to enforce it, to the same extent as in any other equity of redemption;⁹ the vendor's title is a mere equity to charge the lands, and, until enforced, the widow is entitled to possession, and rents and profits.¹⁰ Where a widow, possessed of a dower interest consummate, purchases the reversionary fee, but

Dower as against the vendor's lien for unpaid purchase-money.

Vendor's lien a personal right not assignable by indorsement of note.

Widow is entitled to dower in equity of redemption from vendor's lien.

¹ But in some cases the courts have gone so far as to protect inchoate dower in the surplus; 2 Jones on Mortgages, § 1694 and authorities; Matthews v. Duryee, 4 Keyes, 525, 535, relying on Mills v. Van Voorhies, 20 N. Y. 412; De Wolf v. Murphy, 11 R. I. 630, 634; Vreeland v. Jacobus, 19 N. J. Eq. 231.

² 1 Washb. R. Prop. bk. 1, ch. vii. § 2, pl. 18; Kauffman v. Peacock, 115 Ill. 212; Holden v. Dunn, 144 Ill. 413; State Bank v. Hinton, 21 Oh. St. 509, 515; Chaffee v. Franklin, 11 R. I. 578; Butler v. Smith, 20 Oreg. 126, 131.

³ McArthur v. Franklin, 15 Oh. St. 485, 491.

⁴ It is uniformly so held: 1 Scrib. 441, § 44, and numerous authorities; Ib., p. 555, §§ 1 *et seq.* with additional authori-

ties; Boyd v. Martin, 9 Heisk. 382, 384; Birnie v. Main, 29 Ark. 591, 596; Cocke v. Bailey, 42 Miss. 81, 86.

⁵ Wheeler v. Morris, 2 Bosw. 524, 535; Glenn v. Clark, 53 Md. 580, 604; George v. Cooper, 15 W. Va. 666, 674; Thomas v. Hanson, 44 Iowa, 651.

⁶ Noyes v. Kramer, 54 Iowa, 22, 25.

⁷ Bowlin v. Pearson, 4 Baxt. 341, 343, citing Green v. Demoss, 10 Humph. 371, 374; Unger v. Leiter, 32 Oh. St. 210, 211; Calmes v. McCracken, 8 S. C. 87, 98.

⁸ Hollis v. Hollis, 4 Baxt. 524, 527; Pettus v. McKinney, 74 Ala. 108, 113.

⁹ Unger v. Leiter, 32 Oh. St. 210, 212; Hollis v. Hollis, 4 Baxt. 525; Greenbaum v. Austrian, 70 Ill. 591.

¹⁰ Flinn v. Barber, 64 Ala. 193, 196.

fails to pay the purchase-money, it is obvious that the vendor's lien extends only to the interest so purchased.¹

It is to be remembered, in connection with the subject of vendor's lien, that while instantaneous seisin, accompanied by a beneficial interest in the husband, is generally held to be sufficient to confer dower upon the wife,² yet seisin for a transient instant only, as where the same act which gives him the estate also conveys it out of him, or where he is the mere conduit employed to pass the title to a third person, does not confer the right.³ It is to this principle that the paramount nature of the vendor's title is sometimes ascribed, and which may be decisive of the dower right between the widow and a person claiming title under the vendor's lien.⁴

* An outstanding judgment at the time of the marriage, [* 239] which by the law constitutes a lien upon the land, gives the widow a similar right as if the judgment were a mortgage; her claim is subject to such lien,⁵ unless the judgment happen to be entered upon the day of the marriage, in which case her dower takes precedence.⁶

It has been held that dower cannot be affected by a mechanic's lien,⁷ at least if it accrue after the marriage and before the death of the employer;⁸ but in Kentucky the widow was required to remove such liens before her dower right attached.⁹

An estate for years created by the husband before or after marriage, whether, if after marriage, the wife join therein or not, is no impediment to her dower; she takes, in such case, dower in the reversion in fee, and also of a proportionate part of the rents.¹⁰

¹ *McCurdy v. Middleton*, 82 Ala. 131, 138. See also *Pope v. Mead*, 99 N. Y. 201, holding the converse.

² *Douglass v. Dickson*, 11 Rich. 417, 422; *Griggs v. Smith*, 12 N. J. L. 22, 23; *Stow v. Tift*, 15 Johns. 458, 462; but the possession of land under a parol contract of purchase, where the purchase-money, though tendered, has not been paid in the lifetime of the husband, constitutes no seisin, and the widow is not dowable: *Latham v. McLain*, 64 Ga. 320, 322; *Lane v. Courtney*, 1 Heisk. 331. Where, however, the husband, under an oral contract, takes possession and pays the purchase-money, he is the equitable owner, and cannot, by causing the vendor to execute a deed to another, deprive his wife of dower: *Everitt v. Everitt*, 71 Iowa, 221.

³ *Fontaine v. Boatmen's Savings Institution*, 57 Mo. 552, 558; *Hurst v. Du-*
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lany, 87 Va. 444; *Rousch v. Miller*, 39 W. Va. 638; see on the subject of dower in lands exchanged, *ante*, p. * 233.

⁴ *Smith v. McCarty*, 119 Mass. 519, citing *Webster v. Campbell*, 1 Allen, 313, and other Massachusetts cases.

⁵ *Robbins v. Robbins*, 8 Blackf. 174.

⁶ *Ingram v. Morris*, 4 Harr. 111.

⁷ *Schaeffer v. Weed*, 8 Ill. 511, 513; *Gove v. Cather*, 23 Ill. 634, 639; *Van Vronker v. Eastman*, 7 Met. (Mass.) 157, 161; *Jaeger v. Bossieux*, 15 Gratt. 83, 105; *Bishop v. Boyle*, 9 Ind. 169.

⁸ *Pifer v. Ward*, 8 Blackf. 252.

⁹ *Nazareth Institution v. Lowe*, 1 B. Mon. 257.

¹⁰ *Herbert v. Wren*, 7 Cranch, 370; *Williams v. Cox*, 3 Edw. Ch. 178; *Weir v. Humphries*, 4 Ired. Eq. 264, 273; *Boyd v. Hunter*, 44 Ala. 705, 719.

There is a conflict of decisions on the question whether a widow is dowable of lands taken for public use in the exercise of the right of eminent domain. Her right has been frequently denied, on the ground that to allow a division of the property so taken would destroy it for the use to which it has been appropriated, and that private interests must give way to public convenience and necessity.¹ But neither of these reasons seems satisfactory, because private property should not be taken, even in the exercise of the power of eminent domain, without compensation to those who are injured by such taking; and if the assignment of dower by metes and bounds would be destructive of the use to which the property is appropriated, it may be given in money, as is done in other cases in which there can be no assignment of specific lands. These considerations are strongly insisted on by Reed, J., in a case of this kind arising in New Jersey, where

Dower in lands taken for public use.

it was held that the wife was a proper party to a proceeding [* 240] * for the condemnation of the husband's land to public use, because she was interested in the land by reason of her inchoate dower.² And in Massachusetts it is held that if land be acquired by purchase without resort to the power of eminent domain, although the corporation purchasing might have had recourse to such power, the dower right of the widow follows the land, with all the incidents to such form of contract between parties.³ It was held in Pennsylvania that a borough, having in the exercise of eminent domain condemned land in which a widow's dower had been assigned, was liable to the widow for its value, although full compensation for the whole value of the land had been made in a proceeding to which she was no party.⁴ It seems to result from the principles underlying the question that the widow, whose husband's property is taken, with or without his consent, for public use, ought not to lose her dower on that account. Judge Gantt, in formulating

¹ *Venable v. Wabash Railway*, 112 Mo. 103, Black, J., dissenting; *Chouteau v. Mo. Pac. R'y Co.*, 122 Mo. 375, Black, Ch. J., and Macfarlane and Gantt, JJ., dissenting; *Baker v. A. T. & S. F. R'y Co.*, 122 Mo. 396, same justices again dissenting; *French v. Lord*, 69 Me. 537, 541; *Gwynne v. Cincinnati*, 3 Oh. 24, 25; *Moore v. New York*, 4 Sandf. 456, 460; s. c. 8 N. Y. 110; *Duncan v. Terre Haute*, 85 Ind. 104, 106.

² *Wheeler v. Kirtland*, 27 N. J. Eq. 534, 536. Judge Reed criticises and condemns the doctrine of *Moore v. New York*, and *Gwynne v. Cincinnati*, and refers to two New York cases in which the same was repudiated or modified. One of these,

In the *Matter of the Central Park Extension*, 16 Abb. Pr. 56, 68, held that the widow's right was transferred from the land to the money received therefor; the other, deciding that, as between a wife and any other than the State, or its delegates or agents exercising the right of eminent domain, an inchoate right of dower in lands is such an interest therein as will be protected, and for which the widow has an action, modifying *Moore v. New York* to that extent: *Simar v. Canaday*, 53 N. Y. 298, 304.

³ *Nye v. Taunton R. R. Co.*, 113 Mass. 277, 279.

⁴ *York v. Welsh*, 117 Pa. St. 174.

his dissenting opinion in the case of *Baker v. A. T. F. & S. F. R'y Co.*,¹ cites a number of cases to show that the inchoate right of dower is a valuable right, to be guarded and preserved by the courts,² and invokes the constitutional inhibition against taking or disturbing private property without just compensation, and proceeds: "when we once concede that the inchoate dower is a valuable interest in the land, and consider that the common-law idea, that 'the public shall be preferred to the private' is opposed to the genius of our institutions and the spirit of our constitution . . . it is very hard to discover a reasonable basis for the rule that even condemnation proceedings, in the exercise of eminent domain, can divert this right without notice or compensation."³

The rule at common law giving dower in all lands of which the husband was seised during coverture implies that the widow is entitled to her dower in all such lands, although they had been, during coverture, sold by judicial process.⁴

The common law has been modified, in this respect, by the English statute,⁵ and in several of the American States, by statutes giving dower in the lands of which the husband died seised or possessed;⁶ in such cases, neither a voluntary assignment in favor of creditors,⁷ nor the title passing to the assignee in bankruptcy,⁸ affects the wife's dower.⁹ So the sale of a *hus- [* 241]

¹ 122 Mo. 396, 400. Judge Gantt directs his argument principally to demonstrate, that the case before the court, as well as the case of *Chouteau v. Mo. P. R'y Co.*, *supra*, is not distinguishable from the case of *Nye v. Taunton R. R.*, 113 Mass., in which all of the judges present had concurred. But he proceeds to give his reasons why the exercise of the power of eminent domain ought not to extinguish dower.

² As to inchoate dower as property, see *post*, § 112.

³ *Ib.*, p. 421.

⁴ *Butler v. Fitzgerald*, 43 Neb. 192, 203, citing authorities.

⁵ 3 & 4 Wm. IV. c. 105.

⁶ *Ante*, § 106.

⁷ *Eberle v. Fisher*, 13 Pa. St. 526. In Pennsylvania the rights of creditors are paramount to the dower of the widow, and the latter is barred by a judicial sale: *Trunkey, J.*, in *Lazear v. Porter*, 87 Pa. St. 513, 517; but this principle does not imply that a sale of real estate by the assignee of an insolvent debtor or of a bankrupt shall bar the wife's dower: *Lazear v. Porter*, *supra*, overruling a dictum in *Worcester v. Clark*, 2 Grant, 84;

Kelso's Appeal, 102 Pa. St. 7, 9. In *Bryar's Appeal*, 111 Pa. St. 81, it is held that a purchaser from an assignee in bankruptcy, subject to a mortgage, and who afterwards purchases such mortgage and sells under a judgment recovered thereon, becoming himself the purchaser, takes free from the dower claim of the bankrupt's wife.

⁸ *Porter v. Lazear*, 109 U. S. 84, 86; *Mattill v. Baas*, 89 Ind. 220.

⁹ In Iowa, however, where the widow takes one-third of all the real estate possessed by the husband at any time during the marriage, which has not been sold on execution or other judicial sale, not relinquished by the wife, it is held that a sale by an assignee in bankruptcy of the bankrupt's land is a judicial sale, and bars the widow's claim: *Taylor v. Highberger*, 65 Iowa, 134; *Stidger v. Evans*, 64 Iowa, 91. So of a sale in partition, although the wife is not made a party: *Williams v. Wescott*, 77 Iowa, 332, 342. In Missouri the wife was held barred of her dower by a partition suit: *Hinds v. Stevens*, 45 Mo. 209; but not by a suit for back taxes, where she is not a party: *Blevins v. Smith*, 104 Mo. 583.

band's interest under a will, the wife not having been made a party to the proceeding, does not debar her of her claim to dower in the lands sold.¹ In Georgia there must be a conveyance by the husband, or by the officer of the law under a judicial sale, to bar the wife of dower in any land owned by the husband during coverture.² But it is held in Arkansas that the forfeiture of land to the State for the non-payment of taxes, and sale by the State after the expiration of the time for redemption, extinguish the widow's dower.³

Sale for unpaid taxes.

§ 112. **Inchoate Dower.** — The right of dower before its consummation by the death of the husband, or by divorce, is not, perhaps, capable of exact and comprehensive definition as a right of property. It is difficult even to state with precision its nature and qualities.⁴ "Dower," says Kent,⁵ "is a title inchoate and not consummate till the death of the husband; but it is an interest which attaches on the land as soon as there is a concurrence of marriage and seisin." "But still," says a Federal judge,⁶ "it is not only an inchoate right, but contingent. It depends upon the death of the husband. If he survive his wife, she has no right transmissible to her heirs, nor during the life of her husband can she give it any form of property, to her advantage. . . . So long as the husband shall live, it is only a right in legal contemplation, depending upon the good conduct of the wife and the death of the husband. Until the death of the husband, the right — if it may be called a right — is shadowy and fictitious, and, like all rights which are contingent, may never become vested." Without undertaking to follow this question into its intricate niceties, some of the prominent principles upon which the adjudications with reference thereto have been placed will here be mentioned.

Inchoate dower.

Although *dicta*, and even decisions, are by no means wanting, which question and deny the quality of an *estate* or *property* [* 242] in *dower inchoate,⁷ yet it is palpably evident that as a *right* it must be an *interest* in land, and that interest is *property*, — the recognition in law of the relation of *the thing to the person*.⁸ This is recognized in the provisions contained in the statutes of some of the States securing the interest of the wife in case of sales under legal proceedings instituted in the

As a right of property.

¹ Dingman v. Dingman, 39 Oh. St. 172, 178.

² Hart v. McCollum, 28 Ga. 478, 481.

³ McWhirter v. Roberts, 40 Ark. 283, 289.

⁴ 2 Scrib. on Dower, 1 *et seq.*

⁵ 4 Kent Comm., * 50.

⁶ McLean, J., in Johnston v. Vandyke, 6 McLean, 422, 440.

⁷ Moore v. New York, 4 Sandf. 456;

s. c. 8 N. Y. 110; Johnston v. Vandyke, 6 McLean, 422; Witthaus v. Schack, 105 N. Y. 332. See dissenting opinion of Thomas, J., in Blevins v. Smith, 104 Mo. 583, 599; Chouteau v. Mo. P. R. R. Co., 122 Mo. 375, 394, and authorities cited.

That dower, before it is assigned, cannot be conveyed by the widow to a stranger, will appear, *post*, § 114.

⁸ *Ante*, §§ 1, 4, 6.

lifetime of the husband;¹ and so, also, means are pointed out to compute the *value* of inchoate dower.² The value of such dower right is also recognized as a sufficient consideration for a promissory note,³ or a promise to pay money,⁴ to support the conveyance to the wife of other lands in exchange therefor;⁵ the general doctrine is stated to be, that a contract between husband and wife, by which she receives money or property in consideration of releasing her contingent right of dower, will be sustained in equity.⁶ Courts of equity will also set aside and declare void conveyances by the husband for the purpose of defeating dower;⁷ and the wife may in equity maintain an action to cancel a deed, as forged, which purports to have been joined in by her.⁸

The authorities are not harmonious on the question whether inchoate dower is subject to be divested or modified by legislative enactment. In many cases it is held that the widow's right to dower is governed by the law as in force at the time of the husband's death,⁹ which involves the power of modifying the right as it existed under a previous law.¹⁰

¹ *Warford v. Noble*, 9 Biss. 320; *Dwyer v. Garlough*, 31 Oh. St. 158, 161; *Westerfield v. Kimmer*, 82 Ind. 365, 368; but the act converting the wife's inchoate dower into a vested estate upon sale to satisfy a mortgage was held unconstitutional, in so far as it affects mortgages executed before its passage: *Helphenstine v. Meredith*, 84 Ind. 1.

² *Jackson v. Edwards*, 7 Pai. 386, 408; *Bartlett v. Janeway*, 4 Sandf. Ch. 396, 398; *DeWolf v. Murphy*, 11 R. I. 630, 634; *Strayer v. Long*, 86 Va. 557, 563; *Mandel v. McClave*, 46 Oh. St. 407; *Gore v. Townsend*, 105 N. C. 228. Inchoate dower being a substantial right, the courts will, in proper cases, make all necessary orders for its protection: *Crosby v. Farmers' Bank*, 107 Mo. 436.

³ *Nichols v. Nichols*, 136 Mass. 256, 258.

⁴ *Sykes v. Chadwick*, 18 Wall. 141.

⁵ *Quarles v. Lacey*, 4 Munf. 251, 258; *Bullard v. Briggs*, 7 Pick. 533, 538; *Bissell v. Taylor*, 41 Mich. 702; *Singree v. Welch*, 32 Oh. St. 320.

⁶ 2 Scrib. on D. 6, § 6, and authorities: *Jones v. Fleming*, 104 N. Y. 418; *Strayer v. Long*, 86 Va. 557.

⁷ This subject is discussed in § 113.

⁸ *Clifford v. Rampfe*, 147 N. Y. 383. See, as holding dower inchoate to be an appreciable interest recognized in law as property belonging to the wife, *Bank of*

Commerce v. Owens, 31 Md. 320, 323; also *Unger v. Price*, 9 Md. 552.

⁹ *Walker v. Deaver*, 5 Mo. App. 139, 151; *Ware v. Owens*, 42 Ala. 212, 215; *Noel v. Ewing*, 9 Ind. 37; *Lucas v. Sawyer*, 17 Iowa, 517, 520; *Parker v. Small*, 55 Iowa, 732. Where the husband alienates the property without a relinquishment by the wife, the law in force at the time of alienation governs: *Peirce v. O'Brien*, 29 Fed. Rep. 402, even if dower be subsequently and before the husband's death abolished, and an "enlarged estate" in the realty of which the husband died seised, be substituted: *Purcell v. Lang*, 97 Iowa, 610.

¹⁰ Judge Napton in the case of *Kennerly v. Missouri Ins. Co.*, 11 Mo. 204, 206, draws the distinction, logical enough as far as it goes, between the rights of the widow against those whose interests have accrued simultaneously with hers, in which case the doctrine is held applicable, and her rights against purchasers and others having a specific lien whose rights must be determined by the law under which they originated. This case is recognized in *Thomas v. Hesse*, 34 Mo. 13, 24, and the doctrine established is, that the right of dower, before its consummation by the husband's death, is liable to legislative interference, while the rights of purchasers, mortgagees, and others in the same lands are protected against any

[* 243] * The constitutionality of acts destroying inchoate dower in lands appropriated for public use under the power of eminent domain is deduced by text-writers¹ and courts,² from the nature of dower, as a positive legislative institution, not resulting from contract;³ and under this view it has been decided, in numerous cases, that there is no constitutional provision protecting the dower right of the wife, before its consummation by the death of the husband, from legislative control.⁴ In a New York case the trial court held that the widow's dower, assigned to her by metes and bounds under a law subsequently, but during the lifetime of the husband, modified by an act subjecting the property to which it attached to sale for the payment of the deceased husband's debts, was subject to sale under this act;⁵ but the appellate court held that the order of sale was unjustified where the dower had already been assigned,⁶ the judge rendering the opinion expressing his view that an act modifying the rights of dower has no application where marriage and seisin had concurred before its passage; but the majority of the court refused to pass upon the constitutionality of the retrospective provisions of such act.⁷

It seems to be the general impression that inchoate dower should be recognized as a right entitled to the same protection as other property, and that legislation abolishing dower, or materially modifying it, should not be permitted to operate retrospectively in any sense.⁸ *Dicta* and dissenting opinions to this effect

[* 244] * are often met with, and in Missouri it was at one time unhesitatingly announced that the legislature has no power to divest inchoate dower. An act under consideration by the Supreme

modification. The same distinction is recognized in other cases; for instance, *Boyd v. Harrison*, 36 Ala. 533, 538. It is held, also, that the legislature cannot affect the rights of existing creditors by enlarging the widow's right of dower: *Patton v. Asheville*, 109 N. C. 685.

¹ 2 Dillon's Mun. Cor. § 594.

² See cases cited, § 111, p. * 239, and *infra*.

³ The pith of this argument is stated to be, that "what the law creates, that it may destroy": 2 Scrib. on Dower, 18, § 14.

⁴ *Boyd v. Harrison*, 36 Ala. 533, 537; *Noel v. Ewing*, 9 Ind. 37, 43; *Strong v. Clem*, 12 Ind. 37, 40; *Moore v. Kent*, 37 Iowa, 20, 22, citing earlier Iowa cases; *Barbour v. Barbour*, 46 Me. 9, 14; *Merrill v. Sherburne*, dictum by Woodbury, J., 1 N. H. 199, 214; *Weaver v. Gregg*, 6 Oh. St. 547, 549; *Melizet's Appeal*, 17 Pa. St.

449, 455; *Randall v. Kreiger*, 23 Wall. 137, 148; *Guerin v. Moore*, 25 Minn. 462, 464; *Morrison v. Rice*, 35 Minn. 436; *Richards v. Bellingham*, 47 Fed. R. 854, affirmed U. S. C. C. A., 54 Fed. R. 209; *Chouteau v. Pac. R. R.*, 122 Mo. 375, 394; *Baker v. R. R.*, 122 Mo. 396; *Bartlett v. Ball*, 43 S. W. R. 783.

⁵ *Lawrence v. Miller*, 1 Sandf. 516, 548.

⁶ *Lawrence v. Miller*, 2 N. Y. 245, 253. See as to dower consummate, *post*, § 115.

⁷ *Ib.*, p. 253.

⁸ 2 Scrib. on Dower, 20, § 18. The author refers to Cord on Rights of Married Women, 265, note; and calls attention to the significant fact that the English Dower Act (3 & 4 Wm. IV. c. 105) makes no attempt, even under the exercise of Parliamentary powers not restricted by constitutional limitations, to interfere with existing dower rights.

Court was held not to affect such right; "and if it did," adds Sherwood, J., rendering the opinion, "it would violate that constitutional provision which forbids that any one be deprived of property 'without due process of law,' and would be a legislative attempt to take the property of one person and bestow it upon another."¹ A case in Georgia, also, holds that the wife cannot be deprived of her inchoate dower by an act of the legislature.² So in Rhode Island.³

§ 113. **Dower as affected by Acts of the Husband.** — It is obvious that the conveyance of any property before the marriage places it beyond the dower right of a subsequent wife, because it is not owned by the husband during coverture,⁴ even if the deed to property so conveyed has not been registered;⁵ and so of lands exchanged before the marriage, or conveyed in fee in trust to uses to be appointed by the grantor, although the appointment be made after the marriage.⁶ Nor is the wife entitled to dower in any estate which was subject to an existing claim or encumbrance against the husband, either at law or in equity, at the time of the marriage, although the conveyance or foreclosure occurred subsequent thereto,⁷ under either a mortgage, lease, statute, or recognizance by which he was bound in good faith before the marriage.⁸ A conveyance made on the day of the marriage, although in point of time before the same took place, is deemed to have been made during coverture and will *not deprive the wife [* 245] of her dower.⁹ So, if a conveyance before marriage is void,

¹ *Williams v. Courtney*, 77 Mo. 587, 588, approved in *Burke v. Adams*, 80 Mo. 504, 515, also mentioned in *Crosby v. Farmers' Bank*, 107 Mo. 436, 444; but disapproved and overruled in the later cases of *Chouteau v. R. R.*, 122 Mo. 375, 394, not without vigorous protest: see the strong dissenting opinion of Gantt, J., in *Baker v. R. R.*, 122 Mo. 396, p. 425.

² *Royston v. Royston*, 21 Ga. 161, 172.

³ *Talbot v. Talbot*, 14 R. I. 57.

⁴ 1 Scrib. 583, § 1.

⁵ *Pratt v. Skolfield*, 45 Me. 386, 389; *Blood v. Blood*, 23 Pick. 80, 85.

⁶ *Link v. Edmonson*, 19 Mo. 487; *Whithed v. Mullery*, 4 Cush. 138, 140; *Baker v. Chase*, 6 Hill, 482; *Tate v. Tate*, 1 Dev. & B. Eq. 22, 28; *Gaines v. Gaines*, 9 B. Mon. 295; *Firestone v. Firestone*, 2 Oh. St. 415, 417.

⁷ *Gully v. Ray*, 18 B. Mon. 107, 113; *Brown v. Williams*, 31 Me. 403, 406; *Fontaine v. Dunlap*, 82 Ky. 321. But where a levy was made on his lands prior to his marriage, and he subsequently conveyed to a third person, who paid the

levying creditor, and took a release to himself of his interest in the premises, it was held that the levy was extinguished, the debtor became seised, and dower attached to his widow: *Mayo v. Hamlin*, 73 Me. 182.

⁸ *Jackson v. Dewitt*, 6 Cow. 316; *Rands v. Kendall*, 15 Ohio, 671, 678; *Sandford v. McLean*, 3 Paige, 117, 123; *Spiell v. Sloan*, 22 S. C. 151. The general rule is stated to be, that "the wife's dower is liable to be defeated by every subsisting claim or encumbrance in law or equity existing before the inception of the title, and which would have defeated the husband's seisin": 4 Kent, * 50.

⁹ *Stewart v. Stewart*, 3 J. J. Marsh. 48; at least the burden of proof to show that there was no advantage taken of the confidential relation is on those denying her right to dower: *Shea's Appeal*, 121 Pa. St. 302, 308. So a judgment entered on the day of the marriage will be deemed to have been entered during coverture: *Ingram v. Morris*, 4 Harr. 111. A conveyance made a few hours before the

or, if voidable, it is avoided during coverture, the wife is of course endowed.¹

A conveyance made by the husband on the eve of marriage, for the purpose of defrauding his intended wife of her dower estate, is void as to her right against the grantee or purchaser from him with notice; and she may recover dower in such case as if no conveyance had been made.² And deeds of gift, executed before but not delivered until after the marriage, are no impediment to the right of dower in the lands therein conveyed.³ The wife may protect her inchoate dower by action to set aside conveyances in fraud of her dower;⁴ but the heirs cannot have it set aside, because it is no fraud against them.⁵

At common law, and in those of the States in which the widow is entitled to dower in all lands of which the husband was seised during coverture, the husband, self-evidently, cannot defeat it by any act in the nature of an alienation or charge.⁶ As, however, a recovery by judgment against a husband in a real action defeats the wife's dower, the husband might defraud her by collusively suffering judgment to go against himself. To give the wife an efficient remedy in such case, the Statute of Westminster II., c. 4, enacted that where the husband had made default in a suit against him for land, the wife should be heard to demand dower; which is said to be but a recital of the common law: "For the common law ought to be intended where the husband had right, and he who recovered had no right; and so is the law to this day if the husband lose by default. And so was the common law before the making of that statute; so that the statute is but the affirmance of the common law on this point."⁷

The substance of this statute has been re-enacted in several [* 246] * States, and the wife is protected from the effects of collusive recovery against the husband, and from his laches in defending against improper actions on general principles of equity.⁸

marriage in fulfilment of a promise based on a valuable consideration given long before, was held not to be fraudulent as against the wife, though she was in ignorance thereof: *Champlin v. Champlin*, 16 R. I. 314.

¹ 1 Scrib. on Dower, 585, § 7.

² *Cranson v. Cranson*, 4 Mich. 230, 235; *Swaine v. Perine*, 5 Johns. Ch. 482, 489; *Petty v. Petty*, 4 B. Mon. 215, 217; *Littleton v. Littleton*, 1 Dev. & B. L. 327, 329; *Rowland v. Rowland*, 2 Sneed, 543, 545; *Brooks v. McMeekin*, 37 S. C. 285; *Brown v. Bronson*, 35 Mich. 415, 417; *Babcock v. Babcock*, 53 How. Pr. 97, 101; *Kelly v.*

McGrath, 70 Ala. 75, 82; *Jones v. Jones*, 64 Wis. 301.

³ *Miller v. Stepper*, 32 Mich. 194, 199.

⁴ *Babcock v. Babcock*, 53 How. Pr. 97, 104.

⁵ *Rowland v. Rowland*, 2 Sneed, 543.

⁶ *Grady v. McCorkle*, 57 Mo. 172, 175.

⁷ *Perk. Prof. Book*, § 376.

⁸ *Gilson v. Hutchinson*, 120 Mass. 27; *Farrow v. Farrow*, 1 Del. Ch. 457; 1 Scrib. on Dower, 586, § 15; 4 Kent, 48; 1 Hilliard's R. Prop., 2d ed., 147, § 40; see, as to conveyances of the husband in fraud of dower, *infra*, p. * 247.

And it has been held that a husband cannot deprive his wife of dower by taking a conveyance of land, purchased with his own money during coverture, to himself for life, with remainder to his

child.¹ Although the wife have joined in a mortgage of the husband's lands, her dower still attaches to the equity of redemption afterward sold under an execution against the husband.²

The weight of authority seems strongly to support the claim of widows to dower in lands conveyed by husband and wife in fraud of

creditors, subsequently avoided by them.³ "A fraudulent deed set aside at the instance of creditors cannot bar the surviving wife of dower as against the creditors or purchasers under a mere decretal sale."⁴ It is held, also, that

where the husband conveyed the property to his wife in fee in fraud of creditors, such conveyance does not, on being set aside for the fraud, affect her dower right, because there can be no merger of a less estate in a greater where the latter is void.⁵ Nor is it material that the wife contracts with her husband to relinquish her dower in the land, in consideration of receiving whatever residue of the land there might be after satisfaction of the debts mentioned in the fraudulent deed; the grant of the inchoate right of dower falls with the deed, and the wife is restored to her former rights.⁶ But when the widow takes dower, not as at common law, in the property of which the husband was seised during coverture, but in that of which he was seised at the time of his death,⁷ the widow is not entitled to dower in land fraudulently conveyed to her by the husband, and after his death set aside at the instance of his creditors; because at the time of his death he was not seised, and the subsequent avoidance related only to creditors, leaving the conveyance as to the wife in full force.⁸ Nor is the wife affected by the fraud of the husband in consummating his contract of sale, although she unite with him in conveying the lands.⁹ So where the wife joins her husband in a deed or mortgage, which * is, [* 247] however, defeated by a sale on execution for a prior judgment, she may claim her dower.¹⁰ But if a deed is not entirely void,

¹ *Crecelius v. Horst*, 11 Mo. App. 304.

² *Harrison v. Eldridge*, 7 N. J. L. 392; *Barker v. Parker*, 17 Mass. 564. *Ante*, p. * 237.

³ *Munger v. Perkins*, 62 Wis. 499, 501.

⁴ *Dugan v. Massey*, 6 Bush, 82, 83; *Malloney v. Horan*, 49 N. Y. Rep. 111, 119; *Richardson v. Wyman*, 62 Me. 280, 283; *Lockett v. James*, 8 Bush, 28, 30; *Robinson v. Bates*, 3 Met. (Mass.) 40, 43;

Stowe v. Steele, 114 Ill. 382, 385; *Horton v. Kelly*, 40 Minn. 193.

⁵ *Humes v. Scruggs*, 64 Ala. 40, 49; *Malloney v. Horan*, 12 Abb. Pr. (N. S.) 289, 294; s. c. 49 N. Y. 111, 119; *Wyman v. Fox*, 59 Me. 100, citing earlier Maine cases.

⁶ *Bohannon v. Combs*, 97 Me. 446.

⁷ See *ante*, § 106.

⁸ *Bond v. Bond*, 16 Lea, 306, 308.

⁹ *Wiswall v. Hall*, 3 Pai. 313.

¹⁰ *Hinchliffe v. Shea*, 103 N. Y. 153.

but contains some element or clause upon which it becomes operative, although fraudulent and void in other respects, the relinquishment of dower will be enforced;¹ and in New Jersey it was decided that the widow's dower is barred by her relinquishment in a deed, although it be set aside for fraud.²

Under the English Dower Act,³ and in those of the States in which the widow is endowed of the lands of which her husband died seised or possessed,⁴ the doctrine that the husband cannot defeat his wife's dower by any act in the nature of an alienation or charge is, of course, inapplicable. Conveyance in fraud of dower during coverture.

But her dower rights are nevertheless protected against the husband's fraudulent attempts to deprive her thereof by voluntary conveyance or collusive charges upon his lands during coverture. "The notion," say the court in *Thayer v. Thayer*,⁵ "that the right of the wife to dower in the husband's lifetime is a *nonentity*, and not susceptible of fraud being perpetrated of it, is unsatisfactory, and, we think, unsound, and at war with the principles of justice. Though the right may be inchoate, it should be protected against the *mala fide* acts of the husband." A conveyance without valuable consideration, with the intent to defeat the wife of her dower, is

void, and will be set aside;⁶ and so a deed to a stranger, [*248] although he paid full consideration, if he knew *that the intention was to defeat the wife's dower.⁷ In Missouri, where the statute gives the widow the right of election between dower as at common law, and to take a child's part of the property

¹ *Cantrill v. Risk*, 7 Bush, 158, 160, in which a deed was held void as to the grantee, but operative under the law of Kentucky as a conveyance in favor of creditors generally; *Manhattan Co. v. Evertson*, 6 Pai. 457, 465, in which the deed contained a declaration of trust which constituted a lien upon the premises.

² *Den v. Johnson*, 18 N. J. L. 87, 90; the New York case of *Meyer v. Mohr*, to the same effect, in 19 Abb. Pr. 299, 304, was, as appears from the case of *Malloney v. Horan*, *supra*, disapproved. See also *Hinchliffe v. Shea*, 103 N. Y. 153, 155.

³ 3 & 4 Wm. IV. c. 105.

⁴ See *ante*, § 106, as to the States in which the common-law rule is modified. The term "possessed," used in these States, is synonymous with "seised": *Stewart v. Stewart*, 5 Conn. 317, 320.

⁵ 14 Vt. 107, 120.

⁶ *Thayer v. Thayer*, *supra*; *Ladd v. Ladd*, 14 Vt. 185, 192, in which case, however, the invalidity of the deed is

predicated upon want of lawful delivery: *McGee v. McGee*, 4 Ired. L. 105, 109, citing *Littleton v. Littleton*, 1 Dev. & B. 327, and *Norwood v. Marrow*, 4 Dev. & B. 442; *Killinger v. Reidenhauer*, 6 Serg. & R. 531, 533; *McClurg v. Schwartz*, 87 Pa. St. 521, 524; *Vanleer v. Vanleer*, 3 Tenn. Ch. 23, holding that the facts constituting the fraud must be set out in the bill; *Crecelius v. Horst*, 11 Mo. App. 304; *Jiggitts v. Jiggitts*, 40 Miss. 718, 721; *Rabbitt v. Gaither*, 67 Md. 94 (in this case the property was in realty bought by the husband, but taken in the name of a third party in order to defraud the wife of her dower). *Everitt v. Everitt*, 71 Iowa, 221 (the facts being similar to those in the case last cited).

⁷ *Brewer v. Connell*, 11 Humph. 500. This decision is based upon the provisions of the statute on the subject. The intention is necessarily presumed from knowledge that the wife's rights would be defeated by the conveyance: *Nichols v. Nichols*, 61 Vt. 426, 431.

remaining after payment of debts, it was held that such election ratified a conveyance to a daughter of land purchased with the husband's own money, but in which he took only a life interest, causing the remainder to be deeded to his daughter by a former wife, for the purpose of defrauding his wife of dower; and that the wife was not entitled to a child's part in such land.¹ The disposition of personal property (in which dower is given by statute in this State) in fraud of the widow's dower therein has repeatedly been held void as to the widow.²

§ 114. **The Wife's Relinquishment of Dower.**—The usual method employed at common law to bar the wife's inchoate dower by her own act, was by levying a fine or suffering a recovery. These are abolished by statute in England,³ and have rarely been resorted to in the United States;⁴ the custom of London, effectually barring the wife's dower by means of a deed of bargain and sale by husband and wife, properly acknowledged by the wife after a separate examination and duly proclaimed and enrolled, was adopted in this country at an early day.⁵ A conveyance by the husband, in which the wife joined, is held sufficient, in most States, to carry her dower without a relinquishment *eo nomine*.⁶ A pecuniary consideration moving the wife is not essential to bind her.⁷

* An essential requisite of the release or relinquishment [* 249] by the wife is, in some of the States, that the husband and wife must join in the deed. An indorsement by the wife upon the husband's deed, written several months afterward, "I agree in the above conveyance," was held not to relinquish her dower in the premises conveyed, for two reasons: that the wife's act was not joined in by the husband, and that the words constituted no relinquishment of dower.⁸ In Iowa, where the widow takes one-third of the husband's real estate in lieu of dower, a wife who, in consideration of the payment

¹ Crecelius v. Horst, 4 Mo. App. 419.

² Ante, §§ 63, 92.

³ 3 & 4 Wm. IV., c. 74.

⁴ Fines and recoveries were once in force in some of the States, but not in others, and are now wholly disused. Recoveries were in use in Massachusetts, but not fines. They were both in use in Maryland, but never in Virginia. Note to 1 Washb. R. Prop. * 199, § 10, referring to Stearns, Real Act. 11; Chase's Case, 1 Bland, Ch. 206, 229.

⁵ 2 Scrib. Dower, 286, § 8; Chase's Case, 1 Bland, Ch. 206, 229; Powell v. Monson Company, 3 Mas. 347, 351, per Story, J.; Davey v. Turner, 1 Dall. 11,

13; Jackson v. Gilchrist, 15 John. 89, 109; Moore v. Rake, 26 N. J. L. 574, 578; Manchester v. Hough, 5 Mas. 67, 68.

⁶ Learned v. Cutler, 18 Pick. 9, 11; Gray v. McCune, 23 Pa. St. 447, 450; Gillilan v. Swift, 14 Hun, 574; Meyer v. Gossett, *infra*; Dutton v. Stuart, 41 Ark. 101; Johnson v. Parker, 51 Ark. 419, Smith v. Handy, 16 Oh. 191, 229; Bute v. Kneale, 109 Ill. 652 (since the statute of 1869); Witthaus v. Schack, 105 N. Y. 332.

⁷ McLane v. Piaggio, 24 Fla. 71, 81.

⁸ Hall v. Savage, 4 Mas. 273, 274; Shaw v. Russ, 14 Me. 432, 434; French v. Peters, 33 Me. 396, 408.

to her of the purchase-money stipulated in a deed of warranty executed by her husband in which she had not joined, orally agreed that she would never make any claim of dower in the land, was held estopped, as well as her heirs, from claiming dower in the land against the vendee and his grantees.¹ But this decision was based upon the purely equitable doctrine of estoppel, and dissented from by one of the judges on the ground that inchoate dower cannot be relinquished by parol.² In the States of Arkansas,³ Delaware,⁴ Illinois,⁵ Indiana,⁶ Kentucky,⁷ Maine,⁸ Massachusetts,⁹ Michigan, New Jersey,¹⁰ Ohio,¹¹ Pennsylvania,¹² South Carolina, and Virginia,¹³ it has been held that the husband is required to join in the wife's relinquishment of dower. But it is not necessary that the conveyance should be simultaneously executed by both, or even on the same day; it is sufficient if it be executed by her before it is delivered, although it had before been executed and acknowledged by the husband.¹⁴ In Alabama, Florida, Maine,¹⁵ Maryland, Minnesota, New Hampshire,¹⁶ Oregon, Rhode Island, and Wisconsin, the relinquishment may be by separate deed.¹⁷ The wife's release of dower by joining in the husband's deed takes effect on such estate only as actually passes by the deed.¹⁸ It is held, on the one hand, that the release conveys no estate, nor extinguishes her right of dower for any purpose or as to any person save in so far as it operates as an estoppel against the releasor in favor of the parties and privies thereto;¹⁹ but on the other hand it is asserted that by the release her dower right is extinguished, and the whole estate, released

Wife may
relinquish
by separate
deed.

¹ *Dunlap v. Thomas*, 69 Iowa, 358, distinguishing this case from the principle applicable to cases where inchoate dower is attempted to be sold independent of the property to which it attaches, as announced in *McKee v. Reynolds*, 26 Iowa, 578. Where mutual deeds pass between husband and wife to debar her dower right, which are held void, the wife is not estopped to claim dower by any act during coverture tending to ratify the transaction; *Shane v. McNeill*, 76 Iowa, 459.

² *Dunlap v. Thomas*, *supra*, p. 362.

³ *Witter v. Biscoe*, 13 Ark. 422, 430; *Meyer v. Gossett*, 38 Ark. 377, 380.

⁴ *Harris v. Burton*, 4 Harr. 66, 67.

⁵ *Osborn v. Horine*, 19 Ill. 124, 125.

⁶ *Scott v. Purcell*, 7 Blackf. 66, 69; *Davis v. Bartholomew*, 3 Ind. 485, 490.

⁷ *Applegate v. Gracy*, 9 Dana, 215, 217.

⁸ *French v. Peters*, 33 Me. 396.

⁹ *Hall v. Savage*, 4 Mas. 273.

¹⁰ *Dodge v. Aycrigg*, 12 N. J. Eq. 82.

¹¹ *Williams v. Robson*, 6 Oh. St. 510, 515.

¹² *Ulp v. Campbell*, 19 Pa. St. 361, 362.

¹³ *Sexton v. Pickering*, 3 Rand. 468, 472.

¹⁴ *Langhorne v. Hobson*, 4 Leigh, 224; *Newell v. Anderson*, 7 Oh. St. 12; *Dundas v. Hitchcock*, 12 How. 256; *Ford v. Gregory*, 10 B. Mon. 175.

¹⁵ Rev. St. 1883, ch. 103, § 6.

¹⁶ *Shepherd v. Howard*, 2 N. H. 507.

¹⁷ 2 Scrib. Dower, 293, § 19.

¹⁸ Thus where prior to the delivery of a deed attachments ripen into a levy covering part of the land described therein, the release of dower is confined to the land actually conveyed: *French v. Lord*, 69 Me. 537, 542.

¹⁹ *Shobe v. Brinson*, 148 Ind. 285, 288; *French v. Lord*, *supra*; *Kitzmiller v. Van Rensselaer*, 10 Oh. St. 63; *Dearborn v. Taylor*, 18 N. H. 153; *Blain v. Harrison*, 11 Ill. 384.

from her dower, is vested in the grantee.¹ In Indiana, where in lieu of dower the widow takes absolutely one-third of the real estate of her deceased husband, she is held to be entitled to this free from all demands of creditors except mortgages in which she has joined; and that where her interest in the husband's real estate is sold under the mortgage, she is entitled to be reimbursed for the value of her share therein out of other assets of the estate, real or personal, if any, in preference to general creditors.²

* It has been held in Delaware³ and Vermont,⁴ that a [* 250] married woman cannot execute a valid power of attorney

Relinquishing to convey lands, even in connection with her husband; by attorney. and in Virginia, that a deed of husband and wife, executed under a power of attorney, is valid as to the husband, though void as to the wife.⁵ In Kentucky a non-resident married woman may convey by agent under her power of attorney, though not a resident.⁶ In Missouri, where the statute provides that the wife may relinquish her dower by joint deed with the husband, and that "a married woman may convey her real estate, or relinquish her dower by a power of attorney authorizing its conveyance, executed and acknowledged by her jointly with her husband," it is held that a power of attorney executed jointly with the husband, appointing an attorney to join with her husband in any conveyance the husband may make of his real estate, and, for her, to execute and deliver any such conveyance, and to relinquish her dower in any real estate so conveyed, is sufficiently in compliance with the statute, and a deed made by such attorney in pursuance of his power is effectual to bar the wife's dower in the land conveyed.⁷ In some States the statute authorizes the wife to exercise the power to convey by attorney.⁸

Where a seal is required for the effective conveyance of real estate, the relinquishment of dower must be under seal. Relinquishment under seal. An instrument, though otherwise conforming to the law, if unsealed, will not bar dower.⁹ In Alabama,¹⁰

Iowa,¹¹ and Kentucky,¹² it is provided by statute that real estate may be conveyed by an instrument not under seal.

The mere signing and sealing of the deed by the wife without

¹ *Elmendorf v. Lockwood*, 57 N. Y. 322, Reynolds, C., dissenting.

² *Shobe v. Brinson*, 148 Ind. 285, citing numerous Indiana cases.

³ *Lewis v. Coxe*, 5 Harr. 401.

⁴ *Sumner v. Conant*, 10 Vt. 9, 19.

⁵ *Shanks v. Lancaster*, 5 Gratt. 110, 118.

⁶ Gen. St. 1887, ch. 24, § 36.

⁷ *De Bar v. Priest*, 6 Mo. App. 531.

⁸ So in Ohio, Pennsylvania, Rhode Island, and probably other States; in

Indiana, Iowa, and Minnesota, such was the law before dower was abolished there.

⁹ *Manning v. Laboree*, 33 Me. 343; *Sargent v. Roberts*, 34 Me. 135; *Giles v. Moore*, 4 Gray, 600; *Walsh v. Kelly*, 34 Pa. St. 84; *Brown v. Starke*, 3 Dana, 316; *Mitchell v. Farrish*, 69 Md. 235, 241.

¹⁰ *Shelton v. Armor*, 13 Ala. 647.

¹¹ *Pierson v. Armstrong*, 1 Iowa, 282, 293.

¹² Gen. St. 1887, ch. 22, § 2.

words constituting a grant or release contained therein is ineffectual to bar her right;¹ nor can the omission be aided by the certificate of acknowledgment.² The wife [* 251] is * not concluded by the contents of a deed signed by her in blank, if filled up differently from what was intended when she signed it, but may show the fraud, even against an innocent grantee, in protection of her inchoate dower.³ But the release is not required to be in technical form; any apt words indicating her intention to grant, or relinquish, or release her interest in the land, will bar her dower.⁴

Intention to relinquish must be indicated,

but no technical form is necessary.

The preponderance of authority seems to hold the relinquishment of dower by an infant *feme covert* wholly ineffectual to divest her right.⁵ No act of disaffirmance is necessary on the part of the wife before bringing her suit;⁶ nor is she required to refund to the purchaser any part of the purchase-money paid by him for the premises in which dower is claimed.⁷

Relinquishment by infant wife.

In the absence of statutory regulations no power exists whereby the dower of an insane wife can be divested, or in any manner impaired. In some of the States provision is made for the disencumbering of the husband's estate of the contingent dower of his wife where the latter is insane, and therefore incompetent to act in her own behalf.⁸ In Alabama,⁹ in a case in which it was held by the Supreme Court that the appointment of a guardian to an insane wife was void for the want of notice to her, the judge delivering the opinion remarked, "And were it otherwise, I apprehend the guardian of a lunatic wife can have no authority to relinquish her dower in the real estate of her husband." In Illinois it is held that a court of equity cannot interfere to deprive an insane married woman of dower.¹⁰ In

Relinquishment by an insane wife.

¹ *Lothrop v. Foster*, 51 Me. 367, 369; *Lufkin v. Curtis*, 13 Mass. 223; *Powell v. Monson Company*, 3 Mas. 347, 349; *McFarland v. Febigers*, 7 Oh. 194; *Agri-cultural Bank v. Rice*, 4 How. 225, 241.

² *Davis v. Bartholomew*, 3 Ind. 485.

³ *Conover v. Porter*, 14 Oh. St. 450, 453.

⁴ *Stearns v. Swift*, 8 Pick. 532, 535; *Frost v. Deering*, 21 Me. 156, 159; *Usher v. Richardson*, 29 Me. 415, 416; *Gillilan v. Swift*, 14 Hun, 574; *Edwards v. Sullivan*, 20 Iowa, 502.

⁵ *Adams v. Palmer*, 51 Me. 480, 486; *Applegate v. Conner*, 93 Ind. 185 (but under the statute of this State an infant wife may now join her husband in the conveyance of his real estate with the

same effect as if she were of full age: p. 187); see authorities cited in 2 *Scrib. on Dower*, 301, §§ 31, 32.

⁶ *Priest v. Cummings*, 20 Wend. 338; *Hughes v. Watson*, 10 Oh. 127, 134; *Sandford v. McLean*, 3 Pai. 117; *Thomas v. Gammel*, 6 Leigh, 9.

⁷ *Shaw v. Boyd*, 5 S. & R. 309; *Markham v. Merritt*, 7 How. (Miss.) 437.

⁸ So in the States of Iowa, Kentucky, Massachusetts, Michigan, Missouri, Ohio, Virginia (see as to the necessity of making the insane wife a party to the proceeding in Virginia, *Hess v. Gale*, 93 Va. 467), and Wisconsin.

⁹ *Eslava v. Lepretre*, 21 Ala. 504, 529.

¹⁰ *Ex parte McElwain*, 29 Ill. 442.

By wife of
an insane
husband.

Missouri there can be no relinquishment of dower by the wife of an insane person, * because [* 252] under the statute dower can be relinquished only

by joint deed, etc., and the deed of an insane person can have no validity.¹ The subject of dower as affected by the insanity of the husband or wife is more fully considered in connection with the disability of insane persons.²

Under the statute *de modo levandi fines*,³ it was required, if a married woman was made party to a fine, that she should first be examined by four justices of the bench or in eyre to ascertain her consent; and when conveyance by deed was substituted instead,⁴ an acknowledgment on a separate examination of the married woman was required. This rule is adopted in most of the States of the Union, and unless the execution of the deed, as her voluntary act, be acknowledged by her upon an examination separate and apart from her husband, it will, as to her, be absolutely void. The States of Connecticut, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, Oregon, and Wisconsin are mentioned by Scribner as not requiring such separate examination and acknowledgment;⁵ but in some of these States dower has been abolished (for instance, Indiana, Iowa, and Kansas), and in many of the other States mentioned as retaining the common-law rule, acknowledgment by the wife is not required to be separate from the husband.

The magistrate or officer taking the wife's renunciation of dower must be disinterested;⁶ but the fact that he is related to the parties does not render him incompetent.⁷ The relinquishment must be taken by and acknowledged before an officer authorized thereto by the statute, and within the territory of his jurisdiction;⁸ the wife must be acquainted with the contents of the deed,⁹ and the officer's certificate must affirmatively show that all the requirements of the statute have been complied with.¹⁰ The decisions on this point * are very [* 253] numerous, and depend upon the local statutes. In all of

¹ Hence, where a married woman joined the guardian of her insane husband in a deed, she relinquishing her dower, and her husband and the guardian conveying the husband's real estate, is not estopped from claiming her dower, either at law or in equity: *Rannells v. Gerner*, 80 Mo. 474, 478, reversing s. c. 9 Mo. App. 506.

² See *Woerner on Guardianship*, § 149.

³ St. 18 Edw. I. c. 4.

⁴ By St. 3 & 4 Wm. IV. c. 74.

⁵ 2 *Scrib. on Dower*, 322, § 2, and authorities.

⁶ *Withers v. Baird*, 7 Watts, 227, 228; *Scanlan v. Turner*, 1 Bai. L. 421, 424.

⁷ *Lynch v. Livingston*, 6 N. Y. 422, 433.

⁸ *Share v. Andersen*, 7 Serg. & R. 43, 63.

⁹ *Raverty v. Fridge*, 3 McLean, 230.

¹⁰ *Corporation v. Hammond*, 1 Harr. & J. 580, 588; *Jourdan v. Jourdan*, 9 S. & R. 268; *Howell v. Ashmore*, 22 N. J. L. 261, 264; *Churchill v. Monroe*, 1 R. I. 209; *Hairston v. Randolphs*, 12 Leigh, 445.

them, however, a compliance with the statute, at least substantially, is required to be set forth in the certificate of the officer. The sufficiency of the acknowledgment is to be determined solely by what appears upon the face of the certificate, and cannot be aided by *aliunde* evidence.¹ But the certificate is not conclusive upon the wife; she may contest its validity, and the force and effect of the formal proof.²

The wife cannot release her inchoate dower to any person but the one who is entitled to the lands to which it attaches;³ nor, at common law, to her husband,⁴ although it is now recognized in equity that a valid agreement may be made between husband and wife for separation and the wife's support,⁵ according to which she may relinquish her inchoate dower.⁶

Cannot release
to a stranger,
nor to her
husband.

§ 115. **Dower Consummate before Assignment.** — The dissolution of the marriage by the death of the husband, and in some instances his conviction of bigamy,⁷ sentence to imprisonment for life,⁸ divorce *a vinculo*,⁹ or judicial sale,¹⁰

Consummation
of dower.

¹ 2 Scrib. on Dower, 364, § 45, and authorities.

² *Per* Walker, J., in *Eyster v. Hatheway*, 50 Ill. 521, 524; *Marsh v. Mitchell*, 26 N. J. Eq. 497, 499; *Johnson v. Van Velsor*, 43 Mich. 208, 219.

³ *Reiff v. Horst*, 55 Md. 42, 47; *Chesnut v. Chesnut*, 15 Ill. App. 442, 446; *Chicago Dock Co. v. Kinzie*, 49 Ill. 289, 293; *Pixley v. Bennett*, 11 Mass. 298; *Harriman v. Gray*, 49 Me. 537; *Witthaus v. Schack*, 105 N. Y. 332, 337; *Dunlap v. Thomas*, 69 Iowa, 358, 361. "Dower may be released to the owner of the fee or to any one in privity with the fee, under the same title as to a warrantor in the chain of title, who may receive the release in discharge of his covenant of warranty and for the benefit of his grantee, however remote": *Hull v. Glover*, 126 Ill. 122, 136.

⁴ On the ground of her disability and the presumption that she is *sub potestati viri*: *McGill, Ch.*, in *Ireland v. Ireland*, 12 Atl. R. (N. J.) 184, 185; *In re Rausch*, 35 Minn. 291.

⁵ *Carson v. Murray*, 3 Pai. 483, 501.

⁶ *Ireland v. Ireland*, *supra*; *Jones v. Fleming*, 104 N. Y. 418, 427. See as to effect of agreement, *ante*, § 112.

⁷ *Hinck. Test. L.*, § 1952.

⁸ *Scribner* deduces this from the language of the statute of Michigan (Comp. L. 1857, p. 954, § 5): "When either party shall be sentenced to imprisonment for

life, . . . the marriage shall be thereby absolutely dissolved without any decree of divorce or other legal process." In *Howell's Ann. St.*, § 6240 (1882), the following language is used: "When the husband shall be sentenced to imprisonment for life, . . . the wife shall be entitled to the immediate possession of all her real estate, in like manner as if he were dead,"—which would justify the conclusion *a fortiori*.

⁹ See *ante*, § 109. In the following States the widow is entitled to dower on divorce for the adultery, sentence to imprisonment, or other misconduct of the husband, as if such husband were dead: Indiana, Maine, Massachusetts, Michigan, Minnesota, Nevada, Oregon, and Vermont. In some of the States the right of dower is referred to the court trying the action; in others the wife is entitled on decree of divorce to all her lands, tenements, and hereditaments. See note to 1 Washb. R. Prop. *258. Divorce for "extreme cruelty" by the husband is, within the contemplation of the Michigan statute, a ground entitling the wife to dower: *Rea v. Rea*, 63 Mich. 257, holding, also, that the right of a divorced wife to dower must be governed as far as practicable by the same rules as if the husband were dead.

¹⁰ *Lawson v. DeBolt*, 78 Ind. 563, 565. By the statutes of Indiana (Rev. St. 1881,

operates to * consummate and perfect the incipient or [* 254] inchoate right of dower, converting it into a vested estate which the widow may enter upon and enjoy. This right is obviously

Governed by <i>lex loci rei</i> <i>sitæ</i> . Not affected by subsequent legislation. No freehold before assign- ment. Not subject to garnishment or execution before assign- ment.	governed by the law of the State in which the property is situated, ¹ and cannot be affected by any legislation subsequent to such consummation, whether there has been an assignment or not. ² But she has no seisin in law, nor right of entry or ownership over the lands to which her right attaches, until the ministerial act of assigning to her in severalty the proportion to which she may be entitled; hence she is said to have no freehold interest in the lands of her husband before assignment of dower, ³ and can neither herself maintain or defend ejectment against the heirs, nor join the heirs in an action of ejectment against others, ⁴ unless such action be authorized by statute. ⁵ It follows that until assignment the dower right of a widow cannot be levied on, garnished, or sold under execution against her or a subsequent husband; ⁶ and that she has no interest therein which is capable of assignment to another, ⁷ unless the statute confers upon it the character of a freehold estate. ⁸ But she may relinquish, as in case of inchoate
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§ 2508) the wife's inchoate right to the real estate of her husband becomes absolute upon a judicial sale thereof, vesting the husband's title in the purchaser. A voluntary assignment for the benefit of creditors has not such effect: *Hall v. Harrell*, 92 Ind. 408; the title vests in the wife on the execution of the sheriff's deed to the purchaser: *Shelton v. Shelton*, 94 Ind. 113.

¹ *Apperson v. Bolton*, 29 Ark. 418, 426; *Mitchell v. Word*, 60 Ga. 525, 531.

² *Ante*, § 112.

³ *Croade v. Ingraham*, 13 Pick. 33; *Hilleary v. Hilleary*, 26 Md. 274, 289; *Reynolds v. McCurry*, 100 Ill. 356, 360; *Rayner v. Lee*, 20 Mich. 384; *Smith v. Shaw*, 150 Mass. 297; *Agan v. Shannon*, 103 Mo. 661, 671. Not even her quarantine: *Bleecker v. Hennon*, 23 N. J. Eq. 123. But see *post*, § 116, as to her quarantine.

⁴ *Pringle v. Gaw*, 5 S. & R. 536; *Coles v. Coles*, 15 Johns. 319, 322; *McCammon v. Detroit, &c.*, 66 Mich. 442.

⁵ *Yates v. Paddock*, 10 Wend. 528, 531; *Den v. Dodd*, 6 N. J. L. 367; *Ackerman v. Shelp*, 8 N. J. L. 125, 129. It is held in Michigan that her statutory right of action before assignment cannot be ex-

tended to her grantee: *Galbraith v. Fleming*, 60 Mich. 408.

⁶ *Payne v. Becker*, 22 Hun, 28, 31; *Rausch v. Moore*, 48 Iowa, 611, 614; *Harper v. Clayton*, 84 Md. 346, and cases cited; *Hayden v. Weser*, 1 Mackey, 457. *Aikman v. Harsell*, 98 N. Y. 186, 191; *Moore v. Harris*, 91 Mo. 616, 622. In Missouri the statute now provides that the widow may assign or transfer her unassigned dower: R. S. 1889, § 4514; but this does not permit its being vendible on execution against her: *Young v. Thrasher*, 61 Mo. App. 413.

⁷ *Jacks v. Dyer*, 31 Ark. 334, 337; *La Framboise v. Grow*, 56 Ill. 197; *Jackson v. Vanderheyden*, 17 John. 167, 169; *Blain v. Harrison*, 11 Ill. 384; *Turnipseed v. Fitzpatrick*, 75 Ala. 297, 303; *Mutual Life Ins. Co. v. Shipman*, 50 Hun, 578; *Hart v. Burch*, 130 Ill. 426.

⁸ As, for instance, in Connecticut: *Greathead's Appeal*, 42 Conn. 374, 375; *Wooster v. Hunts Co.*, 38 Conn. 256, 257; *Minnesota: Dobberstein v. Murphy*, 64 Minn. 127 (authorizing conveyance of consummate though not assigned dower); *Missouri: Young v. Thrasher, supra* (but while the widow may convey her unassigned dower, it cannot be taken on exe-

dower, before the husband's death, to the *terre-tenant* holding the legal title.¹ And, in most States, equity will subject the unassigned dower right to the satisfaction of the claims of * her creditors;² or they may enforce the assignment of her dower in order to subject it to their claims.³ So the assignment of the widow's dower right, before allotment, though inoperative at law, is effectual in a court of equity, and will in a proper case be enforced and the transferee protected.⁴

§ 116. **Quarantine of Dower.**— Under the provisions of Magna Charta, a widow "shall tarry in the chief house of her husband by forty days after the death of her husband, within which days her dower shall be assigned her. . . . And she shall have in the mean time her reasonable estovers of the common."⁵ Lord Coke interprets this language to mean that dower shall be speedily assigned, "to the end the widow might not be without livelihood;"⁶ and that estovers signifies "sustenance, or aliment, or nourishment; . . . that is, things that concern the nourishment or maintenance of man in *victu et vestitu*, wherein is contained meat, drink, garments, and habitation."⁷ Lord Coke says that it was certainly the law of England before the Conquest, that the woman should continue a whole year in her husband's house.⁸

In the United States the provisions for the widow in this respect are, as a general thing, more liberal in her favor than those of the common

cution); Vermont: *Gorham v. Daniels*, 23 Vt. 600, 611; *Dummerston v. Newfane*, 37 Vt. 9, 13.

¹ *Reed v. Ash*, 30 Ark. 775, 779; *Carnall v. Wilson*, 21 Ark. 62, 65; *Pope v. Mead*, 99 N. Y. 201; *Morse, J.*, in *Galbraith v. Fleming*, 60 Mich. 408, 413.

² *Davison v. Whittelsey*, 1 McArth. 163; *Tompkins v. Fonda*, 4 Pai. 448; *Potter v. Everett*, 7 Ired. Eq. 152, 155; *Wilson v. McLenaghan*, 1 McMullen, Eq. 35, 39; *Maccubbin v. Cromwell*, 2 Harr. & G. 443, 455; *Strong v. Clem*, 12 Ind. 37; *McKenzie v. Donald*, 61 Miss. 452; *Boltz v. Stolz*, 41 Oh. St. 540; *Payne v. Becker*, 87 N. Y. 153; *McMahon v. Gray*, 150 Mass. 289.

But see, to the contrary, *Saltmarsh v. Smith*, 32 Ala. 404, 408; *Blain v. Harrison*, 11 Ill. 384; *Maxon v. Gray*, 14 R. I. 641; *Harper v. Clayton*, 84 Md. 346, and cases cited (holding that in the absence of statutory authority or fraud equity has no such jurisdiction).

³ So under a statute in Missouri: *Rev.*

St. 1889, § 4546; *Waller v. Mardus*, 29 Mo. 25; and in Connecticut: *Greathead's Appeal*, 42 Conn. 374; in Iowa this is left an open question, but equity will in no case do so, where the petition fails to show that the real estate out of which the dower is sought is all of which the husband was seised, or where all the persons interested are not before the court: *Getchell v. McGuire*, 70 Iowa, 71.

⁴ *Reeves v. Brooks*, 80 Ala. 26; *Wilkinson v. Brandon*, 92 Ala. 530; *Robie v. Flanders*, 33 N. H. 524; *Lamar v. Scott*, 4 Rich. L. 516; *Bostwick v. Beach*, 103 N. Y. 414, 422.

⁵ Great Ch., 9 Hen. III. c. 7.

⁶ Co. 2 Inst. ch. 7, Magna Charta (2). "The reason why such speed is made is for that her quarentine is but for forty days. . . . If she marry she loseth her quarentine": *Ib.* (1).

⁷ *Ib.*, ch. 7 (6).

⁸ Co. Litt. 32 b, citing Lamb, § 120, 71, and "diverse ancient manuscripts."

Quarantine in the several States. law. No change from the common law is made in Delaware,¹ Maryland,² Massachusetts,³ * New [* 256] Hampshire,⁴ New York,⁵ North Carolina,⁶ and Tennessee.⁷ In Maine the period during which the widow may remain in the mansion of the deceased husband is extended to ninety days;⁸ in Arkansas, to two months, and until dower is assigned;⁹ in Ohio,¹⁰ Oregon,¹¹ and Rhode Island,¹² to one year; and in Alabama,¹³ Florida,¹⁴ Georgia,¹⁵ Illinois,¹⁶ Kentucky,¹⁷ Michigan,¹⁸ Missouri,¹⁹ Nebraska,²⁰ New Jersey,²¹ Vermont,²² Virginia,²³ West Virginia,²⁴ and Wisconsin,²⁵ no limit to her right of possession exists until dower be assigned. These provisions are generally additional to those made for the immediate support of the family; and in those States in which dower is abolished by statute, the homestead laws, the year's support allotted to widow and family, and the laws regulating the descent of real estate, afford an ample equivalent for the quarantine at common law.

Quarantine includes mansion, appurtenant buildings, plantation, &c. mansion or dwelling-house, together with all the appurtenant buildings, and the messuage or plantation connected therewith,²⁶ but that it constitutes a freehold for life, unless sooner defeated by the act of the heir,²⁷

¹ Laws, 1874, p. 515, § 1, par. 6; p. 533, § 1.

² No provision is found in the statutes as to quarantine.

³ Pub. St. 1882, p. 740, § 3.

⁴ Publ. St. 1891, ch. 195, § 2.

⁵ 2 Banks & B. (1896, 9th ed.) p. 1817, § 17; giving also reasonable sustenance.

⁶ Code, 1883, §§ 2102 *et seq.*

⁷ Th. & St. St. § 2398; Code, 1884, § 3244.

⁸ Rev. St. 1871, p. 758, § 14. This provision seems to be omitted in Rev. St. 1883.

⁹ See Stull *v.* Graham, 60 Ark. 461, 477. And shall have sustenance out of the estate: Dig. of St. 1894, §§ 2536, 2537.

¹⁰ Bates' Ann. St. 1897, § 4188.

¹¹ Code, 1887, § 2976, also giving sustenance for one year.

¹² Gen. Laws, 1896, p. 923, § 6.

¹³ Code, 1896, § 1515. See Clancy *v.* Stevens, 92 Ala. 577.

¹⁴ Rev. St. Fla. 1892, § 1834.

¹⁵ Together with the furniture; Code, 1895, § 4693.

¹⁶ Riggs *v.* Girard, 133 Ill. 619.

¹⁷ St. Ky. 1894, § 2138.

¹⁸ How. St. § 5744.

¹⁹ Rev. St. 1889, § 4533. See Holmes *v.* King, 93 Mo. 452, 458, discussing this question and citing Missouri cases.

²⁰ Comp. St. 1887, ch. 23, § 11.

²¹ Gen. St. 1895, p. 1276, § 2.

²² St. 1894, § 2597.

²³ Code, 1887, § 2274.

²⁴ Code, 1891, p. 616, § 8.

²⁵ St. Wis. 1898, § 3872.

²⁶ White *v.* Clark, 7 T. B. Mon. 640, 642; Inge *v.* Murphy, 14 Ala. 289, 291; Rambo *v.* Bell, 3 Ga. 207, 209; Driskell *v.* Hanks, 18 B. Mon. 855, 864.

²⁷ Ackerman *v.* Shelp, 8 N. J. L. 125, 129; Inge *v.* Murphy, *supra*; Burks *v.* Osborn, 9 B. Mon. 579, 580 (only as a means of coercing the heirs to a speedy assignment); Bleecker *v.* Hennion, to similar effect, 23 N. J. Eq. 123, 124. Ejectment will lie for her quarantine before assignment of dower: Miller *v.* Talley, 48 Mo. 503, 504. This estate of the widow in this element of her dower is rather analogous to a tenancy at will: Simmons *v.* Lyle, 32 Gratt. 752, 757; Spinning *v.* Spinning, 43 N. J. Eq. 215, 246.

[*257] * which she may occupy by a tenant as well as by herself; the occupation of the tenant is hers,¹ and she is entitled to the rent paid by the tenants.² Whether she can assign her right to remain in the mansion-house to another has been differently held, the right being affirmed in Missouri,³ and denied in Alabama.⁴ The right of quarantine, however, is confined exclusively to property of which she is dowable, differing in this respect from the right of homestead; she may have the right of homestead,⁵ but cannot have quarantine of dower, in leaseholds;⁶ nor does quarantine attach to property on which the husband did not reside at the time of his death,⁷ although it be the only real estate owned by him.⁸ Nor can the widow of a deceased tenant in common exclude the cotenant in common under the right of quarantine.⁹ So it is held in Missouri, that, if a widow elects to take a child's share in lieu of dower, she renounces dower with all its incidents, including quarantine.¹⁰ And it is obvious that the widow cannot, under the law giving her quarantine, defend her possession against an adverse or a paramount title; in this respect she is in no better condition than her husband would have been.¹¹

Widow may rent it to a tenant.

Confined to property of which she is dowable, on which husband resided.

Election to take child's share defeats quarantine.

Quarantine defeated by paramount title.

¹ *Craige v. Morris*, 25 N. J. Eq. 467, 468; *Doe v. Bernard*, 7 Sm. & M. 319, 324; *Hyzer v. Stoker*, 3 B. Mon. 117; *Trask v. Baxter*, 48 Ill. 406; *Stokes v. McAllister*, 2 Mo. 163, 166.

² *Chaplin v. Simmons*, 7 T. B. Mon. 337, 338; *McLaughlin v. McLaughlin*, 22 N. J. Eq. 505, 510; s. c. 20 N. J. Eq. 190; *Reeves v. Brooks*, 80 Ala. 26, 30. And the probate court has jurisdiction in an action by the widow against the administrator for rents collected before assignment: *Gentry v. Gentry*, 122 Mo. 202, 222. The widow's right is not limited to the rent paid for the mansion-house or messuages, but extends to the income from all property assigned to her as dower, from the death of the husband, which she may recover after assignment: *Austell v. Swann*, 74 Ga. 278.

³ *Jones v. Manly*, 58 Mo. 559, 564; *Stokes v. McAllister*, 2 Mo. 163, 166.

⁴ *Barber v. Williams*, 74 Ala. 331, 333; *Wallace v. Hall*, 19 Ala. 367, 372.

⁵ *Ante*, § 95.

⁶ *Pizzala v. Campbell*, 46 Ala. 35, 38 (but in this case homestead is also denied in a leasehold estate, see judgment on

rehearing, p. 40); *Voelckner v. Hudson*, 1 Sandf. 215, 218.

⁷ *Smith v. Smith*, 13 Ala. 329, 333; *Waters v. Williams*, 38 Ala. 680, 684; *McClurg v. Turner*, 74 Mo. 45; in *Indiana* the term "messuage" is held to include a few acres of land, but not the whole farm; *Grimes v. Wilson*, 4 Blackf. 331, 333. In *Missouri* the fact that the mansion was located on land owned for life only by the husband does not defeat the widow's right of quarantine in that part of the land owned by him in fee, even when it is not contiguous thereto, but was used together: *Gentry v. Gentry*, 122 Mo. 202.

⁸ *Clary v. Sanders*, 43 Ala. 287, 295.

⁹ *Collins v. Warren*, 29 Mo. 236, 238.

¹⁰ *Wigley v. Beauchamp*, 51 Mo. 544, 546, commenting on and affirming *Matney v. Graham*, 50 Mo. 559, and overruling *Orrick v. Robbins*, 34 Mo. 226. It has already been noticed that in *Missouri* an election to take a child's part operates as a confirmation of a conveyance in fraud of dower: *ante*, § 113.

¹¹ *Taylor v. McCrackin*, 2 Blackf. 260, 262.

It has been held, in several instances, that the widow is entitled *to her quarantine free of taxes and interest on [* 258] encumbrances which must be charged to the general estate;¹

Quarantine not
subject to
taxes.

but not the estate assigned for dower, the taxes upon which constitute a charge upon the property enjoyed by her.²

§ 117. **Assignment of Dower.**—The method of assigning dower to the widow is prescribed by statute in a number of States; at common law, and in the absence of a statutory provision assigned by parties without legal proceedings. to the contrary, it is not necessary to resort to legal proceedings. themselves as effectually in the matter of assigning dower as in any other transaction.³ It may be done by parol; nothing is required but to ascertain and assign her share to the widow, and then if she has entered, the freehold vests in her.⁴ But if any particular course of proceedings is indicated, this must of course be observed. Thus, in Arkansas,⁵ Connecticut,⁶ Ohio,⁷ and Rhode Island,⁸ the assignment must be in writing. In Nebraska, it is held that the widow cannot institute a partition suit for her dower.⁹

Assignment of dower is distinguished as being either *according to or against common right*; the former being the setting apart of the share of lands to which the widow is entitled from the lands constituting the late husband's real estate by metes and bounds, when practicable,¹⁰ to be

* held by her during her life; the latter implies a special [* 259]

¹ *Branson v. Yancy*, 1 Dev. Eq. 77, 81 (Henderson, J., dissenting, but not on the ground that the quarantine was chargeable with taxes: p. 84); *Graves v. Cochran*, 68 Mo. 74, 77; *Simmons v. Lyle*, 32 Gratt. 752; *Felch v. Finch*, 52 Iowa, 563, 567; *Gentry v. Gentry*, 122 Mo. 202; *Spinning v. Spinning*, 43 N. J. Eq. 215, 245. But see *Riggs v. Girard*, 133 Ill. 619, 626.

² *Austell v. Swann*, 74 Ga. 278, 281.

³ *Austin v. Austin*, 50 Me. 74, 77; *Gibbs v. Esty*, 22 Hun, 266, 269; *Lenfers v. Henke*, 73 Ill. 405, 411; *Clark v. Muzzy*, 43 N. H. 59; *Mitchell v. Miller*, 6 Dana, 79, 83 (allotment of slaves); *Moore v. Waller*, 2 Rand. 418, 421; *McLaughlin v. McLaughlin*, 20 N. J. Eq. 190; *Campbell v. Moore*, 15 Ill. App. 129, 133; *Peters v. West*, 70 Ga. 343, 348; *Conant v. Little*, 1 Pick. 189. But a consent decree will not bind mortgagees who are not parties: *Lehman v. Rogers*, 81 Ala. 363.

⁴ *Johns v. Fenton*, 88 Mo. 64, 68;

Austin v. Austin, *supra*; *Shattuck v. Gragg*, 23 Pick. 88, 92; *Boyers v. Newbanks*, 2 Ind. 388, 390; *Meserve v. Meserve*, 19 N. H. 240, 243. Parol proof of loss of papers and of their contents, and of possession by the widow for a long time of the land, prove title of dower: *Yount v. Miller*, 91 N. C. 331, 334.

⁵ Dig. of St. 1894, § 2554.

⁶ 2 Scrib. on Dower, 74, § 5.

⁷ *Bates' Ann. St.* 1897, § 5707.

⁸ *Gen. Laws*, 1896, p. 923, § 4.

⁹ *Hurste v. Hotaling*, 20 Neb. 178, 182, citing *Coles v. Coles*, 15 John. 319.

¹⁰ A court of chancery has no power to order the sale of real estate in which the widow has dower, and decree that she receive money in lieu of dower, unless it be first ascertained that it is impracticable to set out dower by metes and bounds: *Wilson v. Branch*, 77 Va. 65, 69; see *Herbert v. Wren*, 7 Cr. 370, 380, holding that part of purchase-money cannot be allotted in lieu of dower, unless all parties consent.

assent or agreement on the part of the widow to accept it, instead of the more precise and formal manner.

Without discussing the various remedies given at law and in equity, and the procedure pointed out, both at common law and under the statutes of the several States, it is deemed sufficient here to indicate some of the salient principles governing the assignment of dower by summary proceeding in the courts controlling the administration of the estates of deceased persons, as "this convenient method of proceeding has, in a great degree, superseded the common-law remedy by action."¹

Assignment
by summary
proceeding.

Jurisdiction to assign dower is vested in courts having jurisdiction of probate matters in Alabama,² Arkansas,³ Connecticut,⁴ Delaware,⁵ Florida,⁶ Illinois,⁷ Iowa,⁸ Kentucky,⁹ Maine,¹⁰ Massachusetts,¹¹ Michigan,¹² Minnesota,¹³ Mississippi,¹⁴ Nebraska,¹⁵ New Hampshire,¹⁶ New

States in which
probate courts
assign dower.

¹ 2 Scrib. on Dower, 175, § 1, referring to 4 Kent, 72; 1 Washb. R. Prop., p. *226; 1 Hilliard, R. Prop., 2d ed., p. 172, § 52.

² *Humes v. Scruggs*, 64 Ala. 40, 44; *Martin v. Martin*, 22 Ala. 86, holding that its jurisdiction is in derogation of common law, and proceedings must therefore strictly conform to the statute; *Turnipseed v. Fitzpatrick*, 75 Ala. 297, 302, holding assignment void if none of the lands are situate in the county where order is made; *Hause v. Hause*, 57 Ala. 262, showing concurrent jurisdiction with courts of equity. Where the decree has to be moulded so as to meet the justice of the case, or where there is a *bona fide* adverse claim, the probate court should decline jurisdiction, and a chancery court should make the proper decree: *Sheppard v. Sheppard*, 87 Ala. 560. See as to the effect of a decree by consent, *Lehman v. Rogers*, 81 Ala. 363.

³ *Hill v. Mitchell*, 5 Ark. 608, 619; but chancery is not ousted: *Jones v. Jones*, 28 Ark. 19, 20; probate and chancery courts have concurrent jurisdiction: *Ex parte Hilliard*, 50 Ark. 34.

⁴ *Hall v. Pierson*, 63 Conn. 332 (pointing out when relief may be had in equity); *Way v. Way*, 42 Conn. 52, 53; upon the application of a creditor having levied: *Greathead's Appeal*, 42 Conn. 374.

⁵ *McCaully v. McCaully*, 7 Houst. 102; *Layton v. Butler*, 4 Harr. 507, 508; *Farrow v. Farrow*, 1 Del. Ch. 457; *Eliason v. Eliason*, 3 Del. Ch. 260, 265.

⁶ Rev. St. 1892, § 1830. See *Milton v. Milton*, 14 Fla. 369.

⁷ *Starr & Curt. An. St.* 1896, p. 1479, § 44 (in proceedings to sell real estate by order of the probate court).

⁸ *Shawhan v. Loffer*, 24 Iowa, 217, 224; *Olmsted v. Blair*, 45 Iowa, 42.

⁹ *Shields v. Batts*, 5 J. J. Marsh. 12, 15; *Rintch v. Cunningham*, 4 Bibb, 462; but not of lands alienated by the husband, p. 463.

¹⁰ *Williams v. Williams*, 78 Me. 82, 84. But not of lands alienated by the husband: *French v. Crosby*, 23 Me. 276, 278; *Austin v. Austin*, 50 Me. 74.

¹¹ *Fuller v. Rust*, 153 Mass. 46; formerly not of premises mortgaged: *Sheafe v. Spring*, 9 Mass. 9, 12; the assignment dates from the approval by the probate court of the commissioner's report: *Kearns v. Cunniff*, 138 Mass. 434.

¹² The record must show the existence of all jurisdictional facts: and the court has no jurisdiction if the right to dower is disputed by the heirs: *King v. Merritt*, 67 Mich. 194, 211.

¹³ 2 Scrib. on Dower, 188, § 36.

¹⁴ Not against strangers to the estate: *Jiggitts v. Jiggitts*, 40 Miss. 718, 726.

¹⁵ Comp. St. 1887, ch. 23, § 8. Dower and curtesy, abolished in this State by Act of 1889.

¹⁶ *Pinkham v. Gear*, 3 N. H. 163, 167; *Burnham v. Porter*, 24 N. H. 570, 577.

Jersey,¹ New York,² * North Carolina,³ Oregon,⁴ Rhode [* 260] Island,⁵ South Carolina,⁶ Tennessee,⁷ Vermont,⁸ Virginia,⁹

States in which and Wisconsin.¹⁰ In West Virginia the word "circuit" probate courts appears in connection with the court referred to, which have no jurisdiction to assign dower. is not in the Code of Virginia; county and circuit courts have concurrent jurisdiction of probate matters in West Virginia, and it seems that jurisdiction to assign dower is not vested in the county court.¹¹ In the other States this power is not vested in testamentary courts; in Pennsylvania it has been so decided.¹²

The proof in the proceeding to obtain the assignment of dower must show marriage with the person in whose estate dower is claimed,¹³ seisin by the husband,¹⁴ and his death, or other circumstance by which the dower right is consummated.¹⁵

Proof necessary in assignment of dower.

Assignment under law at time of death.

Against alienees at time of alienation.

As a general rule, dower is assignable according to the law in force at the time of the husband's death;¹⁶ but as to her right in property aliened, without her joining in the conveyance, during coverture, she is entitled according to the law as it stood at the

date of * the alienation.¹⁷ She is entitled to dower in the [* 261]

¹ Gen. St. 1896, p. 1280, § 27.

² Concurrent with Superior Court and County Court: C. C. Pr. §§ 263, 340; but not where title is contested: *Parks v. Hardey*, 4 Bradf. 15, 16.

³ Concurrent with the Superior Court: *Campbell v. Murphy*, 2 Jones Eq. 357, 359; proceedings should be in the county of the husband's last residence, but lands in adjoining county may be assigned: *Askew v. Bynum*, 81 N. C. 350. See *Efland v. Efland*, 96 N. C. 488.

⁴ Code, 1887, § 2961, when title is not disputed.

⁵ But can entertain no equitable defenses: *Gardner v. Gardner*, 10 R. I. 211, 213; but see *Eddy v. Moulton*, 13 R. I. 105, and *Smith v. Smith*, 12 R. I. 456.

⁶ *Stewart v. Blease*, 4 S. C. 37, 40; it may set aside the report and direct assignment *de novo*: *Irwin v. Brooks*, 19 S. C. 96.

⁷ *Rhea v. Meredith*, 6 Lea, 605, 607; but chancery has concurrent jurisdiction, when proceeding in county court is fraudulent, or the widow claiming dower is also administratrix: *Spain v. Adams*, 3 Tenn. Ch. 319, 322.

⁸ *Danforth v. Smith*, 23 Vt. 247, 257.

⁹ Code, 1887, § 2275; *Devaughn v. Devaughn*, 19 Gratt. 556, 562.

¹⁰ 2 Scrib. on Dower, 188, § 36.

¹¹ Code, 1891, p. 616, § 9.

¹² *Shaffer v. Shaffer*, 50 Pa. St. 394, 396.

¹³ But direct proof of marriage is not indispensable; it may be proved by reputation, declarations, and circumstances supporting a presumption: *Jones v. Jones*, 28 Ark. 19, 22; *Jackson v. State*, 8 Tex. App. 60, 62; *Blackburn v. Crawford*, 3 Wall. 175, 187; *Van Tuyl v. Van Tuyl*, 57 Barb. 235. See *ante*, § 107; 2 Scrib. on Dower, 205, §§ 2-14.

¹⁴ Strict proof is not required: possession of the widow under direct or mesne conveyance from the husband; or possession by the husband with claim of title, or receipt of rents by him from the person in possession, is sufficient *prima facie* proof: *Carnall v. Wilson*, 21 Ark. 62, 67; *Smith v. Lorillard*, 10 Johns. 338, 355; *McCullers v. Haines*, 39 Ga. 195; *Gentry v. Woodson*, 10 Mo. 224; *Morgan v. Smith*, 25 S. C. 337. See *ante*, § 111.

¹⁵ Proof of husband's seisin at some time when the applicant for dower was his wife, and his subsequent death, makes a *prima facie* case in her favor: *Reich v. Berdel*, 120 Ill. 499, 501.

¹⁶ *Ante*, § 112.

¹⁷ *Mayburry v. Brien*, 15 Pet. 21, 38; *Thomas v. Hesse*, 34 Mo. 13, 24; *John-*

value of the lands at the time of the assignment, excluding the increase in value by reason of improvements made thereon by the vendee or his grantees after the alienation by the husband, but not excluding the increased value by natural appreciation, or in consequence of the improvements made by the owners of adjoining lands.¹ But where improvements upon the land at the time of the alienation are subsequently torn down or deteriorate, the converse of the rule does not seem to hold good; she is not allowed dower in the value of the property at the time of the alienation, but in its value at the time of the husband's death.² But the widow is entitled to dower in the value of the premises at the time of the assignment, where improvements have been erected after a sale by the administratrix under order of the court, for the payment of her deceased husband's debts, and before the assignment of dower.³

According to value at time of alienation.

But if deteriorated, according to value at time of death.

Where the nature of the property in which dower is to be assigned precludes its setting apart by metes and bounds, as where the husband was seised in common, or in coparcenary, the widow takes her dower in the husband's share of such property in common with the heir and other tenants;⁴

Assignment in common with cotenants.

In a mill.

in a mill she may be endowed either of the [* 262] * third toll-dish, or of a third of the profits, or of the

ston *v. Vandyke*, 6 McLean, 422, 427; Curtis *v. Hobart*, 41 Me. 230, 232. In Indiana, the statute of 1852, abolishing dower and giving the widow one-third of the husband's realty, was held not applicable to land conveyed by the husband previously: Bowen *v. Preston*, 48 Ind. 367, 372, citing the previous Indiana cases. The same condition exists in Iowa: Moore *v. Kent*, 37 Iowa, 20; Craven *v. Winter*, 38 Iowa, 471, 481; Peirce *v. O'Brien*, 29 Fed. Rep. 402, citing Iowa cases. The consequence of this doctrine was held, in Indiana, to operate to the widow's deprivation of dower in lands sold by the husband prior to the enlargement of dower, because to give her dower as fixed by the act of 1852 would be to change the encumbrance subject to which the purchaser bought into a fee, thus impairing a vested right: Taylor *v. Sample*, 51 Ind. 423. *Quære* whether in such case the widow was not entitled to dower unaffected by the law of 1852?

Hobbs, 47 Md. 359, 370; Scammon *v. Campbell*, 75 Ill. 223, 227; Wood *v. Morgan*, 56 Ala. 397, 399; Peirce *v. O'Brien*, 29 Fed. Rep. 402; Felch *v. Finch*, 52 Iowa, 563; Baden *v. McKeney*, 18 Dist. Col. 268, 272, citing cases *pro* and *con*; Young *v. Thrasher*, 115 Mo. 222, 234; Sanders *v. McMillan*, 98 Ala. 144; Butler *v. Fitzgerald*, 43 Neb. 192.

² "Though this would seem to be pushing the doctrine to a questionable extreme" *per* Durfee, C. J., in Westcott *v. Campbell*, *supra*; McClanahan *v. Porter*, 10 Mo. 746, 752; Thompson *v. Morrow*, 5 S. & R. 289, 291; *per* Wood, J., in Dunseth *v. Bank of U. S.*, 6 Oh. 76. In Kentucky the value when the husband alienated the land is considered, without considering any amelioration or deterioration by acts of the purchaser: Pepper *v. Thomas*, 85 Ky. 539, 546.

³ Phinney *v. Johnson*, 15 S. C. 158.

¹ Boyd *v. Carlton*, 69 Me. 200, 203; Carter *v. Parker*, 28 Me. 509; Westcott *v. Campbell*, 11 R. I. 378, 380; Price *v.*

⁴ *Ante*, § 111. Scribner, vol. 2, p. 639, § 1, mentions such hereditaments as a piscary, offices, a fair, a market, a dove-house, courts, fines, heriots, &c., as requiring an assignment in the rents and profits.

In a ferry. entire mill for every third month;¹ in a ferry, one-third of the profits, or the use of the ferry for a third part of the time, should be set apart to the widow;² and so, whenever there can be no assignment by metes and bounds, there may be either a division of the rents and profits, after deducting expenses for reasonable repairs and taxes, but not insurance,³ or a sale and division of the proceeds;⁴ or a sum may be adjudged to her in gross for her dower interest.⁵ If there be a sale of the whole estate, including the dower of the widow, she is entitled either to a gross sum, equal to an amount necessary to yield an annual payment to her of the interest on one-third of the net proceeds of sale for the remainder of her life, which may be determined according to the annuity tables,⁶ generally indicated either by statute or by the supreme courts of the several States;⁷ or to the payment of a sum equal to the interest on her share annually until her death.⁸ In the latter case the payments should not be made for a whole year at a time, but in monthly or quarterly instalments.⁹

In rents and profits, or in proceeds of sale.

Rule to ascertain value of life estate.

A sale of the lands of a deceased person by the administrator * for the payment of debts of the deceased, [* 263] under order of the probate court, does not include the dower right of the widow; hence she will

Dower not conveyed by administrator's sale of lands.

¹ *Per* Marshall, J., in *Smith v. Smith*, 5 Dana, 179, 180; but see, as to the Illinois statute on this subject, *Walker v. Walker*, 2 Ill. App. 418, 420.

² *Stevens v. Stevens*, 3 Dana, 371, 373.

³ *Hillgartner v. Gebhart*, 25 Oh. St. 557; *Walsh v. Reis*, 50 Ill. 477, 480. A proper method of assigning dower in coal mines which the husband owned in common, is to give her one-third of the proceeds derived from the mines of her husband's share: *Clift v. Clift*, 87 Tenn. 17. In New York, where the court has, as required by statute, fixed a sum equal to one-third of the rental value of the property, and specified the same in the decree, the court has no power to alter such final judgment, the rents having depreciated: *McIntyre v. Clark*, 43 Hun, 352.

⁴ *Lenfers v. Henke*, 73 Ill. 405, 410.

⁵ *Rich v. Rich*, 7 Bush, 53, 55. Where a sum is assessed in lieu of dower, but not in fact paid, the widow still has her claim against the land itself, but no specific lien thereon, under which she can sell it, in the hands of an alienee: *Williamson v. Gasque*, 24 S. C. 100.

⁶ A number of such are given by Scribner in an appendix to vol. 2 of his

work on Dower. In Alabama it is held that the "American Table of Mortality" should be resorted to, as the orthodox standard throughout the United States and Canada, and that chancellors and registers ought to take judicial knowledge of both the existence and contents of this table: *Gordon v. Tweedy*, 74 Ala. 232, 237.

⁷ *Graves v. Cochran*, 68 Mo. 74, 76; *Unger v. Leiter*, 32 Oh. St. 210, 214; *Wood v. Morgan*, 56 Ala. 397, 399; *Banks v. Banks*, 2 Th. & C. 483, 484. And the health of the widow should be taken into account: *McLaughlin v. McLaughlin*, 20 N. J. Eq. 190, 195; *Swain v. Hardin*, 64 Ind. 85; *Gordon v. Tweedy*, 74 Ala. 232, 237. In South Carolina, one-sixth of the proceeds is paid to the widow in lieu of her dower without reference to the age of the widow: *Stewart v. Pearson*, 4 S. C. 4, 46, citing *Wright v. Jennings*, 1 Bai. 277, 280; *Woodward v. Woodward*, 2 Rich. Eq. 23, 28; and *Douglass v. McDill*, 1 Spears, 139, 140.

⁸ *Ware v. Owens*, 42 Ala. 212, 217.

⁹ *Scammon v. Campbell*, 75 Ill. 223, 228.

not be precluded by such sale, although she herself made it as administratrix, from claiming her dower in the lands sold against the vendee.¹ But a sale or mortgage by her *as dowress*, in connection with the heirs, conveys her dower right, which she cannot afterward set up against any person;² and she may become a party to a sale by the administrator, conveying her dower interest to the purchaser at the administrator's sale,³ and is then entitled to an allowance out of the proceeds of sale.⁴ The same result follows where the probate court is empowered by statute to order the sale of real estate free from the widow's dower.⁵

§ 118. **Ante-Nuptial Contracts as affecting Dower.**—Jointures, so named from the joint tenancy thereby created in the husband and wife,⁶ were introduced by the English Statute of Uses⁷ in lieu of dower, which, as has already been stated,⁸ was recognized by the common law as attaching to strictly legal seisin only, and wholly repudiated in chancery. Originally, * the word meant a joint estate limited to both husband and wife, but by the later rules may be an estate limited to the wife only, expectant upon a life estate in the husband.⁹ The provisions of the Statute of Uses relating to jointure have been substantially adopted in most of the United States.

Jointures.

Statutes of
Uses in the
United States.

Equitable jointures differ from legal jointures chiefly in this, that the former are good, although the estate settled upon the wife be less than one of freehold to continue during her life, if she be of age

¹ This subject is treated in connection with the Sale of Real Estate by order of the probate court, and the liability of purchasers to the dowress, *post*, § 483; see authorities there cited.

² *Hoppin v. Hoppin*, 96 Ill. 265, 270, 272. One of the grounds upon which this decision was based is that the warrantor is not permitted to attack a title, the validity of which he has covenanted to maintain: *Clark v. Baker*, 14 Cal. 612, 630; *Van Rensselaer v. Kearney*, 11 How. 297, 325. So where she represents her husband as being dead, and conveys with the children, she will be equitably estopped from asserting her dower upon the husband's actual death: *Rosenthal v. Mayhugh*, 33 Oh. St. 155, 159; 2 Scrib. on Dower, 251 *et seq.*

³ In Alabama, by filing her written consent in the office of the probate judge, to the end that a complete title may be vested in the purchaser at the administrator's sale: Code, 1886, § 2127. If she fail to file such consent, the sale does not

convey her dower, and she has no interest in the proceeds, but may pursue her dower in the land unaffected by such sale: *Bradford v. Bradford*, 66 Ala. 252, 256.

⁴ Where the probate court has no jurisdiction in the subject of dower, it is doubtful whether it can order the payment to the widow of her share in the proceeds; but if there has been a conversion, the jurisdiction is undoubted: *Hart v. Dunbar*, 4 Sm. & M. 273, 287. Nor can the administrator recover from the estate the sum he has paid the widow for her release of dower in lands sold by him under probate license: *Needham v. Belote*, 39 Mich. 487.

⁵ *Schmitt v. Willis*, 40 N. J. Eq. 515.

⁶ *Tomlins, Law Dict.*

⁷ 27 Hen. VIII. c. 10. One of the mischiefs sought to be remedied by this statute is recited to be "that by uses men lost their tenancies by the curtesy and women their dowers."

⁸ *Ante*, § 111.

⁹ *Abb. Law Dict., tit. "Jointure."*

Jointures in equity. and join in the deed;¹ and in most States any pecuniary provision made for the benefit of the intended wife in lieu of dower will, if assented to by her, operate as a bar.² It appears that courts incline to a liberal construction of contracts in support of settlements made as a substitute for dower;³ whether a legal bar to dower exist or not, courts of equity will enforce specific performance of ante-nuptial agreements in lieu of dower, according to the same principles which govern them in other cases of specific performance of contracts.⁴ Hence the provisions made for the wife must be fair and reasonable, or she may elect to take her dower instead;⁵ the covenants must be fully performed on the part of the husband; a failure to comply with them through his fault or neglect destroys the validity of her covenant not to claim dower.⁶ It is held in some cases that marriage alone is not a sufficient consideration, the ante-nuptial agreement to relinquish dower without some provision in lieu thereof being deemed contrary to public policy;⁷ but in * others marriage is held a sufficient con- [* 265] sideration to support a contract for the relinquishment of dower, if fairly entered into by a woman *sui juris*.⁸ But the breach

¹ 2 Scrib. on Dower, 409, § 35.

² A statutory provision that a jointure in favor of an intended wife shall bar any claim for dower does not deprive her of the power to bar her dower by any other form of ante-nuptial contract: *Barth v. Lines*, 118 Ill. 374.

³ "Disregarding forms, the aim should be to protect the rights of dower, and if that object is attained by the agreement, the law is satisfied without any nice discriminations between legal and equitable jointures": *Logan v. Phillips*, 18 Mo. 22, 28; *Vincent v. Spooner*, 2 Cush. 467, 474; *Findley v. Findley*, 11 Gratt. 434, 437; *Andrews v. Andrews*, 8 Conn. 79, 85.

⁴ *Gould v. Womack*, 2 Ala. 83, 91; *Jenkins v. Holt*, 109 Mass. 261, 262; *Babcock v. Babcock*, 53 How. Pr. 97, 100.

⁵ *Rivers v. Rivers*, 3 Desaus. 190, 195; *Farrow v. Farrow*, 1 Del. Ch. 457; *Shaw v. Boyd*, 5 S. & R. 309. It is self-evident that a contract induced by fraudulent representations is void: *Peaslee v. Peaslee*, 147 Mass. 171, and such a contract cannot be ratified during coverture: *Ib.*, p. 181; and it has been held that she is not bound when she acts in ignorance of her real legal rights, if she be misled by those standing to her in a confidential relation, though no actual fraud be intended: *Spurlock v. Brown*, 91 Tenn. 241, and cases

referred to. Persons betrothed stand to each other in confidential relations; it is the duty of each to be frank in the disclosure of all circumstances bearing on the contemplated agreement: *Kline v. Kline*, 57 Pa. St. 120, quoted approvingly in *Pulling's Estate*, 93 Mich. 274; and it is held that if the provisions for the intended wife be disproportionately small to the means of the intended husband, there arises a *prima facie* presumption of designed concealment, which the husband's representatives must overcome: *Taylor v. Taylor*, 144 Ill. 436; and see further to same effect: *Graham v. Graham*, 143 N. Y. 573.

⁶ *Sullings v. Sullings*, 9 Allen, 234, 237; *Butman v. Porter*, 100 Mass. 337, 339; *Camden Mut. Association v. Jones*, 23 N. J. Eq. 171, 173; *Garrard v. Garrard*, 7 Bush, 436, 441; *Johnson v. Johnson*, 23 Mo. 561, 568.

⁷ *Curry v. Curry*, 10 Hun, 366, 370, *et seq.*; *Stilley v. Folger*, 14 Ohio, 610, 647; *Grogan v. Garrison*, 27 Oh. St. 50, 64, *et seq.*; *Mowser v. Mowser*, 84 Mo. 437, 440.

⁸ *McNutt v. McNutt*, 116 Ind. 545, 548, 550; *Farwood v. Farwood*, 86 Ky. 114, and authorities; *Sparlock v. Brown*, 91 Tenn. 241, 255, citing cases *pro and con*.

of a covenant collateral to the controlling purpose of the contract, without fraud on the husband's part, will not be construed as entitling her to claim dower.¹

Post-nuptial settlements are not absolutely binding upon the widow, as a bar to her dower, either at law or in equity;² if not a legal jointure within the Statute of Uses, she will at law be entitled to both the provision and her dower;³ but in equity, and at law in cases where the settlement would, if made before marriage, constitute a legal jointure, she is put to her election whether she will take dower or the jointure.⁴ And where, as is the case in many States, the statute authorizes married women to convey their property as if single, the wife's release of her right to dower to her husband is binding, if made for a good consideration, and without fraud or improper dealing.⁵ But if she release her dower on the husband's oral promise to convey to her other lands, and he becomes insolvent before he has done so, equity will not aid her to obtain a decree for dower against his assignee.⁶ To require the widow to elect, the intention to exclude dower by the marriage settlement must be shown, either by express words or manifest implication; otherwise she will be entitled to both.⁷

The wife may effectually relinquish dower by an agreement to separate; deeds of separation are upheld by courts in this country, as well as in England, if made through the medium of a trustee,⁸ or even without a trustee, if consummated.⁹

[* 266] But "courts will not enforce any contract which is the price of consent by one party to the procurement of a divorce by the other;"¹⁰ hence an agreement whereby the wife, pending her action for divorce, agreed with her husband, for a consideration paid partly at the time, the remainder to be paid when the divorce was granted, to make no claim for alimony, is void, as

¹ *Freeland v. Freeland*, 128 Mass. 509, 512.

² *Townsend v. Townsend*, 2 Sandf. 711; *Crane v. Cavana*, 36 Barb. 410; *Martin v. Martin*, 22 Ala. 86; *Walsh v. Kelly*, 34 Pa. St. 84; *Carson v. Murray*, 3 Pai. 483; *Rowe v. Hamilton*, 3 Me. 63. Accepting a gift of personalty from the husband in contemplation of death, and declared in writing to be for her individual use and benefit, is no waiver of dower: *Mitchell v. Word*, 60 Ga. 525, 531; nor accepting a deed of real estate: *Dockray v. Milliken*, 76 Me. 517, 519; whether before or after the husband's death: *McLeery v. McLeery*, 65 Me. 172.

³ *Hastings v. Dickinson*, 7 Mass. 153,

155, affirmed in *Gibson v. Gibson*, 15 Mass. 106, 110; *Vance v. Vance*, 21 Me. 364, 369.

⁴ *Parham v. Parham*, 6 Humph. 287, 297; *Butts v. Trice*, 69 Ga. 74, 76.

⁵ *Rhoades v. Davis*, 51 Mich. 306.

⁶ *Winchester v. Holmes*, 138 Mass. 540.

⁷ *Liles v. Fleming*, 1 Dev. Eq. 185, 188; *Swaine v. Perine*, 5 John. Ch. 482, 488; *Dudley v. Davenport*, 85 Mo. 462.

⁸ *Garbut v. Bowling*, 81 Mo. 214, 217, citing authorities.

⁹ *Hutton v. Hutton*, 3 Pa. St. 100, 104.

¹⁰ *Per Pardee, J.*, in *Appeal of Seeley*, 56 Conn. 202.

being against public policy, and constitutes no bar against her right to dower.¹

§ 119. **Election between Dower and Devise.**—It has already been observed,² that it is the policy of the law to place the widow's dower beyond the reach of the husband, who can, at common law as well as under the statutes of most States, neither sell, convey, nor otherwise dispose of his real estate so as to deprive his widow of dower therein without her free consent. A devise to such effect is *a fortiori* void, unless she chooses to abide by it. If, therefore, the husband devise lands to his wife, she will, under the English doctrine as held before the change made by statute in this respect,³ take them as a voluntary gift in addition to what the law secures to her as dower, unless it appear plainly, either by express words or by manifest implication, that the devise was intended to exclude dower.⁴ The statute referred to, enacted long after the establishment of the American government,⁵ is of no force *proprio vigore* in any of the States of the Union; and the doctrine holding devises to be given in addition to dower, if not otherwise directed by the testator, is recognized in all of them where not abrogated or modified by their own statutes. This is the rule in California,⁶ Connecticut,⁷ * Delaware,⁸ Georgia,⁹ Iowa,¹⁰ [* 267]

¹ Although the divorced wife, upon payment of the consideration after the decree, executed a receipt to the husband "in full of all demands to date, and particularly in full for all claims of alimony": Appeal of Seeley, *supra*. See also to same effect, Orth v. Orth, 69 Mich. 158.

² *Ante*, § 105.

³ 3 & 4 Wm. IV. c. 105, § 9.

⁴ Birmingham v. Kirwan, 2 Sch. & Lef. 444, 452; Roper, Husb. & Wife, 568; 2 Scrib. on Dower, 440; Lawrence v. Lawrence, 2 Vern. 365; Lemon v. Lemon, 8 Vin. Abr. 366, pl. 45; Hitchin v. Hitchin, Pr. Ch. 133; Brown v. Parry, 2 Dick. 685.

⁵ 29 August, 1833.

⁶ Instead of dower or curtesy, spouses take respectively one-half of the community property (as to which see *post*, § 122) upon the death of the other; and it is held that any devise by a husband to his wife goes to her in addition to the moiety secured to her by law: Beard v. Knox, 5 Cal. 252, 256, approved in Payne v. Payne, 18 Cal. 291, 301, and in Estate of Silvey, 42 Cal. 210, 213. See also Pratt v. Douglass, 38 N. J. Eq. 516, 535, in which the

law of California in this respect is clearly stated.

⁷ Lord v. Lord, 23 Conn. 327, 331; Hickey v. Hickey, 26 Conn. 261. See Anthony v. Anthony, 55 Conn. 256, holding that a testator giving his widow two-thirds of the entire income of the personal property, and the use of nearly one-half of all the real estate, meant to exclude dower.

⁸ Kinsey v. Woodward, 3 Harr. 459, 464, followed in Warren v. Morris, 4 Del. Ch. 289, 299.

⁹ Tooke v. Hardeman, 7 Ga. 20, 27; Speer v. Speer, 67 Ga. 748, 749.

¹⁰ Iowa has abolished dower at common law (see *ante*, § 106), but courts still use the term "dower" to designate the widow's right in the property of her deceased husband. It is held that devise to the wife of a life estate in all the testator's real property is consistent with her dower right to one-third of it in fee: Daugherty v. Daugherty, 69 Iowa. 677; Blair v. Wilson, 57 Iowa, 177, following Metteer v. Wiley, 34 Iowa, 214, and other earlier cases. Parker v. Hayden, 84 Iowa, 493;

New York,¹ South Carolina,² Vermont,³ Virginia,⁴ and West Virginia.⁵

This rule, however, was changed in England by the statute already mentioned,⁶ which has been incorporated, with some modifications, into the codes of many States. According to the English statute, the devise to the wife of any land, or any estate or interest therein, barred her of dower, unless a contrary intention appeared from the will, thus reversing the presumption arising from an unexplained devise for the benefit of the widow. In some of the States the language of the statute is more sweeping than that of the English act, and seems to bar dower in every case where the widow takes anything under the will. So, for instance, in the States of Florida⁷ and North Carolina.⁸ Generally, however, the condition allowing her to enjoy both the devise and dower is, that such shall clearly appear to be the testator's intention, either expressed or necessarily implied; so held

[* 268] in the States of Alabama,⁹ Arkansas,¹⁰ Illinois,¹¹ * Indiana,¹²

Howard v. Watson, 76 Iowa, 229; but a different rule prevails where the life estate is given in personal property, in which case she must elect: Foster's Will, 76 Iowa, 364. A gift of one-third of all testator's estate held to be in addition to her dower or distributive share under the statute: Estate of Blaney, 73 Iowa, 113; and she is not obliged to elect, unless it clearly appear from the will that the gift was intended to be in lieu of dower: Sutherland v. Sutherland, 102 Iowa, 535.

¹ Konvalinka v. Schlegel, 104 N. Y. 125; Matter of Frazer, 92 N. Y. 239, 250; Earl, J., in the Matter of Zahrt, 94 N. Y. 605, 609; Lewis v. Smith, 9 N. Y. 502, 511; Adsit v. Adsit, 2 Johns. Ch. 448, 450.

² Hiers v. Gooding, 43 S. C. 428; Lumeral v. Lumeral, 34 S. C. 85; Braxton v. Freeman, 6 Rich. Law, 35.

³ Hatch's Estate, 62 Vt. 300.

⁴ Herbert v. Wren, 7 Cr. 370, 377; Dixon v. McCue, 14 Gratt. 540, 548, announcing the rule on this subject to be the same as announced in England by Chancellor Kindersley, in Gibson v. Gibson, 17 Eng. L. & Eq. R. 349, 352.

⁵ Tracey v. Shumate, 22 W. Va. 474, 499; Atkinson v. Sutton, 23 W. Va. 197, 200. In both of these cases it is held that evidence showing the situation of the testator and the circumstances surrounding him at the time of writing the will is competent to show his intention.

⁶ 3 & 4 Wm. IV. c. 105, § 9.

⁷ The widow loses her dower right unless she dissent from the will within one year: Wilson v. Fridenberg, 21 Fla. 386, 389.

⁸ Code, 1883, § 2103.

⁹ Dean v. Hart, 62 Ala. 308, 310, citing earlier Alabama cases.

¹⁰ Apperson v. Bolton, 29 Ark. 418, 427.

¹¹ Blatchford v. Newberry, 99 Ill. 11, 55, in which Mr. Justice Sheldon remarks that the legal effect of a devise in lieu of dower is a mere offer by the testator to purchase the dower interest for the benefit of the estate; United States v. Duncan, 4 McLean, 99, in which it was held that the testamentary provision, to bar dower, must afford a reasonable presumption that it was given in lieu of dower; Warren v. Warren, 148 Ill. 641, 647, in which the court intimates that the Duncan case is no longer applicable since the change in the phraseology of the statute, and holds that any provision is now sufficient to bar dower (unless the will is renounced by the widow) and that it makes no difference that the devise is given to another in trust for her.

¹² There is no dower in Indiana; but the principle applies to the widow's rights under the Statute of Descents, and it is held that she cannot take both under a will and under the statute in the absence of a clearly expressed intention to that effect: Ragsdale v. Parrish, 74 Ind. 191,

Kansas,¹ Kentucky,² Maine,³ Maryland,⁴ Massachusetts,⁵ Michigan,⁶ Minnesota,⁷ Mississippi,⁸ Missouri,⁹ Montana,¹⁰ Nebraska,¹¹ New Hampshire,¹² Ohio,¹³ Oregon,¹⁴ Pennsylvania,¹⁵ Rhode Island,¹⁶ Tennessee,¹⁷ and Wisconsin.¹⁸

Where the widow cannot take both devise and dower, she may elect to take either.

If the devise or provision in the will be inconsistent with the enjoyment of the right of dower,¹⁹ or expressly stated to be in lieu of dower,²⁰ or not expressed to be in addition to dower in those States which do not allow dower and *devise cumulatively [* 269]

195. Gift of the residue to a class, "after my beloved wife has taken her portion according as the law provides," clearly indicates the testator's intention that a specific devise of real estate to his wife, preceding the residuary clause, shall be in addition to her share under the statute: *Burkhalter v. Burkhalter*, 88 Ind. 368.

¹ *Sill v. Sill*, 31 Kans. 248, 252, quoting the statute, Comp. L. 1879, ch. 117, §§ 41 *et seq.* But the husband may execute a valid will giving the whole of his property to his wife: *Martindale v. Smith*, 31 Kans. 270.

² *Smith v. Bone*, 7 Bush, 367; *Exchange Bank v. Stone*, 80 Ky. 109, 115; *Huhlein v. Huhlein*, 87 Ky. 247.

³ *Hastings v. Clifford*, 32 Me. 132; *Allen v. Pray*, 12 Me. 138.

⁴ *Durham v. Rhodes*, 23 Md. 233, 242; *Gough v. Manning*, 26 Md. 347, 366.

⁵ Pub. St. 1882, p. 750, § 20; *Upham v. Emerson*, 119 Mass. 509, 510.

⁶ How. St. 1882, § 5750; *Tracy v. Murray*, 44 Mich. 109. The testator's intention may, in case of doubt, be ascertained by proof of the surrounding circumstances under which the will was executed: *Dakin v. Dakin*, 97 Mich. 284, 291.

⁷ Dower being abolished, this principle holds good under the law of descent: *Washburn v. Van Steenwyk*, 32 Minn. 336, 349; *In re Gotzian*, 34 Minn. 159.

⁸ *Wilson v. Cox*, 49 Miss. 538, 544; *Booth v. Stebbins*, 47 Miss. 161, 164. But in this State also dower is abolished by statute: *ante*, § 106.

⁹ *Dougherty v. Barnes*, 64 Mo. 159, 161, citing other Missouri cases; *Kaes v. Gross*, 92 Mo. 647, 660; *Martien v. Norris*, 91 Mo. 465, 471. But the statute refers only to lands of which the husband died seised; as to lands conveyed during cover-

ture the common-law rule governs: *Hall v. Smith*, 103 Mo. 289.

¹⁰ She is barred of all dower, whether the husband had conveyed before his death, or died seised: *Spalding v. Hirshfield*, 15 Mont. 253.

¹¹ Cons. St. 1893, §§ 1123-17.

¹² Pub. St. 1891, ch. 195, § 17; *Copp v. Hersey*, 31 N. H. 317, 330.

¹³ *Hibbs v. Insurance Co.*, 40 Oh. St. 543, 553; *Corry v. Lamb*, 45 Oh. St. 203.

¹⁴ Code, 1887, § 2971.

¹⁵ *Watterson's Appeal*, 95 Pa. St. 312, 316.

¹⁶ Gen. Laws, 1896, p. 666, § 21; *Chapin v. Hill*, 1 R. I. 446; see *Durfee*, *Petitioners*, 14 R. I. 47, 53.

¹⁷ Code, 1884, § 3251; *Jarman v. Jarman*, 4 Lea, 671, 673.

¹⁸ *Application of Wilber*, 52 Wis. 295; *Wilber v. Wilber*, 52 Wis. 298; *Van Steenwyck v. Washburn*, 59 Wis. 483, 497.

¹⁹ Where, for instance, the directions of the testator in the disposition of the estate cannot be carried into effect if the widow also take her dower: *Dodge v. Dodge*, 31 Barb. 413, 417; *Tobias v. Ketchum*, 32 N. Y. 319, 327; *Matter of Zahrt*, 94 N. Y. 605, 609; *Asche v. Asche*, 113 N. Y. 232; *Speer v. Speer*, 67 Ga. 748; *Norris v. Clark*, 10 N. J. Eq. 51, 55; *Colgate v. Colgate*, 23 N. J. Eq. 372; *Griggs v. Veghte*, 47 N. J. Eq. 179; *Bailey v. Boyce*, 4 Strobb. Eq. 84, 91; *Alling v. Chatfield*, 42 Conn. 276; *Van Guilder v. Justice*, 56 Iowa, 669; *In re Gotzian*, 34 Minn. 159.

²⁰ It is immaterial in such case whether the presumption be in favor of cumulative right to devise and dower, or that the devise is in lieu of dower; for in every case the testator's will is to be followed, if not in derogation of the widow's statutory right.

without express direction or manifest intention of the testator,¹ the widow, though she cannot enjoy both her dower right and the provision made for her by will, may elect to take either the one or the other.

The right of election is guaranteed to the widow in the fullest manner, and for the purpose of enabling her to secure her own best interest and greatest advantage. To this end she is entitled, not only to have sufficient time to make her choice, but also to full information of the condition of the estate, either by a bill in equity to ascertain the extent of the respective interests,² or by a full disclosure on the part of the executor or administrator, or by the judge of the probate court, as may be provided by statute.³ No act of election will be binding on the widow, unless done under a full knowledge of all the circumstances, and of her rights, and with the intention of electing;⁴ and if she exercise the right prematurely she will not be estopped from maintaining an action, within the time allowed by law for such election, to cancel the election so made.⁵ Thus she is not bound by an election made under the mistaken supposition that the estate accepted by her is free from all claims and demands, or before a knowledge of the circumstances necessary to a judicious and discriminating choice has been obtained,⁶ or if it was induced by fraud or imposition.⁷ But if she make her election under a full knowledge of the facts, she will be bound thereby,⁸ in the absence of fraud or unfair advantage, even though she did not understand her legal rights.⁹

¹ *Barnard v. Fall River Bank*, 135 Mass. 326; *Cowdrey v. Hitchcock*, 103 Ill. 262, 273.

² *United States v. Duncan*, 4 McLean, 99, 102; *Melizet's Appeal*, 17 Pa. St. 449, 455; *Hall v. Hall*, 2 McCord Ch. 269, 280; *Smither v. Smither*, 9 Bush, 230, 236; *Grider v. Eubanks*, 12 Bush, 510, 514; *Johnston v. Duncan*, 67 Ga. 61, 71.

³ It is held in Tennessee, that if the widow is prevented by the fraud of the executor or other person from dissenting to the will, the executor will be deemed a trustee, the same as if she had dissented in time: *Smart v. Waterhose*, 10 Yerg. 94, 103.

⁴ *Payton v. Bowen*, 14 R. I. 375; *Milikin v. Welliver*, 37 Oh. St. 460; *Anderson's Appeal*, 36 Pa. St. 476, 496; *Woodburn's Estate*, 138 Pa. St. 606; *Garn v. Garn*, 135 Ind. 687; *O'Driscoll v. Koger*, 2 Desaus. 295, 299; *English v. English*, 3 N. J. Eq. 504, 510; *Tooke v. Hardeman*, 7 Ga. 20, 30; *Hill v. Hill*, 88 Ga. 612; *Clark v. Hershy*, 52 Ark. 473; *Stone v. Vandermark*, 146 Ill. 312; *Reaves*

v. Garrett, 34 Ala. 558, 562; *Sill v. Sill*, 31 Kans. 248; *James v. Dunstan*, 38 Kans. 289; *Yorkly v. Stinson*, 97 N. C. 236.

⁵ *Dudley v. Pigg*, 149 Ind. 363, 370.

⁶ In such case equity will relieve her: *Pinckney v. Pinckney*, 2 Rich. Eq. 218, 237; *Upshaw v. Upshaw*, 2 Hen. & Munf. 381, 390, 393; *Osmun v. Porter*, 39 N. J. Eq. 141; *Goodrum v. Goodrum*, 56 Ark. 532 (holding that a conveyance by the executor before retraction of the widow's election will not be affected by her retraction, but she will be made whole out of other lands not conveyed).

⁷ *McDaniel v. Douglas*, 6 Humph. 220, 229, approving *Smart v. Waterhose*, 10 Yerg. 94; *Morrison v. Morrison*, 2 Dana, 13, 18; *Elbert v. O'Neil*, 102 Pa. St. 302; *Burden v. Burden*, 141 Ind. 471; *Dudley v. Pigg*, 149 Ind. 363.

⁸ She must take subject to all the charges and limitations of the will: *Kline's Appeal*, 117 Pa. St. 139, 148; *Snook v. Snook*, 43 N. J. Eq. 132.

⁹ *Light v. Light*, 21 Pa. St. 407; *Mc-*

Thus, by her deliberate election to take under the will she bars * herself of her dower, although the estate prove [* 270] insolvent.¹ Nor can she treat her election as a nullity, and yet retain what she has received in virtue thereof.² The statutes of the several States contain minute provisions as to the time and manner in which the election is to be made;³ and as the right is a statutory one, the widow is held to a strict compliance therewith.⁴ If she permit the time to expire without making her election, she will, in most States, be held to a waiver of her dower.⁵

The right to elect is a strictly personal one, which in the absence of statutory authority can be exercised by no one for her, although she die before the time given to make the election have expired,⁶ or be insane;⁷ but provision is made by statute, in some instances, authorizing the widow to elect by attorney or guardian.⁸ In Maine the election by an insane widow was held valid, on the ground that the acts of an insane person are not void, but voidable.⁹ In the case of infant widows the courts sometimes make elections for them,¹⁰ or it must be made by her guardian.¹¹ In England courts of equity would grant relief to persons under disability required to elect between two inconsistent

Daniel v. Douglas, *supra*; Bradfords v. Kents, 43 Pa. St. 474, 484; Cannon v. Appersen, 14 Lea, 553, 592.

¹ Grider v. Eubanks, 12 Bush, 510, 514. See Evans v. Pierson, 9 Rich. L. 9. Nor can she, in such case, take dower in lands, the income of which was part of the estate devised in lieu of dower, but which devise was void because in contravention of law: Lee v. Tower, 124 N. Y. 370.

² Steele v. Steele, 64 Ala. 438, 461; Tomlin v. Jayne, 14 B. Mon. 160, 162; see Evans v. Pierson, 9 Rich. L. 9.

³ In 2 Scrib. on Dower, 505, §§ 16 *et seq.*, will be found a collection of these statutes.

⁴ It was held in Missouri, in the cases of Price v. Woodford, 43 Mo. 247, 253, and Ewing v. Ewing, 44 Mo. 23, that the failure of the probate court to notify the widow of her right of election, as required by statute, does not operate to extend the time given her by the statute. See further, on this point, *infra*, p. * 271.

⁵ Akin v. Kellogg, 119 N. Y. 441; Stephens v. Gibbs, 14 Fla. 331, 352; Waterbury v. Netherland, 6 Heisk. 512; Dougherty v. Barnes, 64 Mo. 159; Gant v. Hend, 64 Mo. 162; Cowdrey v. Hitchcock, 103 Ill. 262, 270; Zaegel v. Kuster,

51 Wis. 31, 39; Kennedy v. Johnston, 65 Pa. St. 451, 454; Quarles v. Garrett, 4 Desaus. 145.

⁶ Fosher v. Williams, 120 Ind. 172; Church v. McLaren, 85 Wis. 122; Sherman v. Newton, 6 Gray, 307; Boone v. Boone, 3 Har. & McH. 95; Hinton v. Hinton, 6 Ired. L. 274; Welch v. Anderson, 28 Mo. 293, 298; Crozier's Appeal, 90 Pa. St. 384; Anderson's Estate, 185 Pa. St. 174; Eltzroth v. Binford, 71 Ind. 455.

⁷ Woerner on Guardianship, § 149; Collins v. Carman, 5 Md. 503, 524; Lewis v. Lewis, 7 Ired. L. 72; Van Steenwyck v. Washburn, 59 Wis. 483, 501; Heavenridge v. Nelson, 56 Ind. 90, 93; Pinkerton v. Sargent, 102 Mass. 568; but see *infra*, p. * 271, note.

⁸ In Delaware: Rev. St. 1874, p. 534, § 7; Missouri: Young v. Boardman, 97 Mo. 181; North Carolina: Code, 1883, § 2108. In Ohio the probate court appoints some person to ascertain what would be most valuable for the widow, and the court enters of record an election to that effect: Bates' Ann. St. 1897, § 5966.

⁹ Brown v. Hodgdon, 31 Me. 65, 67.

¹⁰ Addison v. Bowie, 2 Bl. Ch. 606, 623.

¹¹ Cheshire v. McCoy, 7 Jones L. 376, 377.

rights;¹ and this doctrine is applied in some American [* 271] States to impose upon courts of equity or probate courts * the duty to make election for an insane widow;² in others, the question is left open and the power doubted.³

Acts *in pais* may determine an election, as well as matter of record: thus assignment of dower by a court of competent jurisdiction,⁴ the filing of a petition for dower within the time allowed to make the election,⁵ renouncing by deed the provision made in the will and claiming dower,⁶ contracting to relinquish her right, for a valuable consideration paid her,⁷ taking possession of property under a will and exercising unequivocal acts of ownership over it for a long time,⁸ and giving written notice to the executors of her intention,⁹ have all been held to constitute an election binding upon the widow. And it has been held in North Carolina that a widow is estopped to take under the law by causing the will to be probated and becoming executrix thereof;¹⁰ but in California the contrary rule is laid down;¹¹ and in Massachusetts, in the analogous case of a husband's right to take under the law against the will, it is held that he is not estopped by probating his wife's will, if he take nothing under it.¹² So in a State where the widow is not entitled to take both her dower and the homestead under the homestead law, her continued occupation of the homestead in the absence of an election to take dower will be deemed an election to take under the homestead right.¹³ But

Acts *in pais*
amounting to
election.

¹ See cases cited by Cooper, J., in *Wright v. West*, 2 Lea, 78, 82, and also by Freeman, J., dissenting, p. 95.

² *Wright v. West*, *supra*, Freeman dissenting on the ground that such election must nevertheless be made within the statutory period allowed therefor: *Kennedy v. Johnston*, 65 Pa. St. 451, 455; *Van Steenwyck v. Washburn*, 59 Wis. 483, 504, *et seq.*; *State v. Ueland*, 30 Minn. 277; *Andrew's Estate*, 92 Mich. 449; *Penhallow v. Kimball*, 61 N. H. 596. "Without authority conferred by statute upon the guardian of an insane widow, it would of course devolve upon the courts to make the election for her": *per Black, J.*, in *Young v. Boardman*, 97 Mo. 181, 188.

³ *Crenshaw v. Carpenter*, 69 Ala. 572.

⁴ *Cheshire v. McCoy*, 7 Jones L. 376.

⁵ *Raynor v. Capehart*, 2 Hawks, 375, 377.

⁶ *Hawley v. James*, 5 Pai. 318, 435; *Young v. Young*, 1 A. K. Marsh. 562; so accepting a legacy and retaining the consideration for a written relinquishment of

dower to the husband estop her; *Stoddard v. Calcompt*, 41 Iowa, 329, 333.

⁷ *Baldwin v. Hill*, 97 Iowa, 586.

⁸ *Reed v. Dickerman*, 12 Pick. 146; *Delay v. Vinal*, 1 Met. (Mass.) 57, 65; *Thompson v. Hoop*, 6 Oh. St. 480, 485; *Stark v. Hunton*, 1 N. J. Eq. 216, 227; *Caston v. Caston*, 2 Rich. Eq. 1; *Craig v. Walthall*, 14 Gratt. 518, 525; *Clay v. Hart*, 7 Dana, 1, 6; *Haynie v. Dickens*, 68 Ill. 267; *Cory v. Cory*, 37 N. J. Eq. 198, 201; *Rutherford v. Mayo*, 76 Va. 117, 123; *Exchange Bank v. Stone*, 80 Ky. 109; *Clark v. Middlesworth*, 82 Ind. 240, 247; *Wilson v. Wilson*, 145 Ind. 659; *Cooper v. Cooper*, 77 Va. 198, 205; *Hovey v. Hovey*, 61 N. H. 599.

⁹ *Greiner's Appeal*, 103 Pa. St. 89.

¹⁰ *Mendenhall v. Mendenhall*, 8 Jones L. 287, affirmed in later cases.

¹¹ *In re Gwin*, 77 Cal. 313.

¹² *Tyler v. Wheeler*, 160 Mass. 206.

¹³ *Thomas v. Thomas*, 73 Iowa, 857; *McDonald v. McDonald*, 76 Iowa, 137. See in connection herewith, *Stone v. Vandermarck*, 146 Ill. 312.

where not only the time, but also the method in which the election is to be made, is pointed out by statute, there must be a substantial, if not literal, compliance with its provisions.¹ Thus, if the renunciation is not made within the time prescribed,² or not in the court³ or with the formalities indicated,⁴ the widow is neither bound nor entitled as if she had made a valid election. There must be something more than a mere intention or determination to elect; nor is the declaration of such an intention itself sufficient.⁵

* The acceptance by the widow of the testamentary pro- [* 272] vision made for her, in lieu of her right of dower in the

Dower under testator's estate, gives her an interest therein superior will has preference to that of a legatee: having relinquished her dower, over other legacies. which is paramount to the rights of creditors as well as

of legatees or devisees, she thereby became a purchaser of the interest represented by the devise or legacy to her. She takes, not by the bounty of the testator, but in virtue of a contract with him, the reciprocal considerations being the relinquishment by the widow of her legal right of dower, thereby enabling the testator to dispose of his estate without reference thereto, and the price offered by him for this right, consisting in the devise or legacy to her.⁶ But while it is agreed, on all sides, that the claim of the widow having relinquished dower is superior to that of other legatees in the will, so

In some States that she takes to their exclusion, if there is a deficiency, on equality it is held in some of the States that, since she takes as with creditors, if by contract, she is on an equality with creditors, and

shares with them if the assets are insufficient to pay the debts and but generally her legacy;⁷ but the view seems to preponderate that postponed to creditors. she can receive nothing by way of legacy until all the debts have been paid.⁸ In Missouri it is held that the

¹ *Supra*, p. * 270, note 4.

² *Ex parte* Moore, 7 How. (Miss.) 665 (the written renunciation was filed within four days after the expiration of the six months allowed by the statute).

³ *Daudt v. Musick*, 9 Mo. App. 169; *Baldozier v. Haynes*, 57 Iowa, 683; *Houston v. Lane*, 62 Iowa, 291. The proper court is the one from which letters must issue: *Cribben v. Cribben*, 136 Ill. 609.

⁴ *Estate of Rhodes*, 11 Phila. 103; *Draper v. Morris*, 137 Ind. 169; *Howard v. Watson*, 76 Iowa, 229 (holding that notice to elect must be given the widow, or she will be entitled to enjoy what has been devised to her. She has six months after notice in which to make her election).

⁵ *English v. English*, 3 N. J. Eq. 504; *Shaw v. Shaw*, 2 Dana, 341, 343; *Forester v. Watford*, 67 Ga. 508.

⁶ *Isenhart v. Brown*, 1 Edw. Ch. 411, 413, citing English and American authorities; *Carper v. Crowl*, 149 Ill. 465, 479; *Jarm. on Wills*, *467; and *Bigelow's* note, p. 458, collecting American cases. As to the preference of legacies in lieu of dower over other legacies, see *post*, § 452, and cases.

⁷ *Tracy v. Murray*, 44 Mich. 109, 112; *Lord v. Lord*, 23 Conn. 327, 330; *Thomas v. Wood*, 1 Md. Ch. 296, 300; *Gibson v. McCormick*, 10 Gill & J. 65, 113; *Shackelford v. Miller*, 91 N. C. 181, 187 (giving the widow preference to creditors under the statute). See also *Green v. Saulsbury*, 6 Del. Ch. 371.

⁸ *Beekman v. Vanderveer*, 3 Dem. 619, 622; *Paxson v. Potts*, 3 N. J. Eq. 313 324; *Bray v. Neill*, 21 N. J. Eq. 343, 350 (but a legacy given in lieu of dower does not

widow taking under a will specifically disposing of all the real and personal property of the testator must contribute to the payment of debts ratably with other legatees and devisees.¹

It may be remarked in this connection, that the renunciation of dower enures to the estate, and has been held to go to the heir or distributee in default of testamentary disposition,² so

that the widow herself is not precluded from [* 273] taking * or sharing therein as heiress or distributee, although she could not take as dowress;³ but it seems that the declaration by the testator that the legacy is to be in lieu of dower, and she accepts it, prevents her from taking anything else.⁴

Dower renounced enures to estate.

On the other hand, the rejection by the widow of the provisions made for her by will generally results in the diminution or contravention of devises and legacies to other parties. The rule in such case is, that the devise or legacy which the widow rejects is to be applied in compensation of those whom her election disappoints.⁵ If she has elected to take dower in another State, it will be presumed that such has been set off to her there, and she cannot resist the sale of real estate in the forum without rebutting such presumption.⁶ If the renounced share is insufficient to compensate the disappointed beneficiary, the other devisees or legatees, at least such as are in the same class with him so far as priority of payment is concerned, must contribute *pro rata* to make up the deficiency.⁷ Where the right of dower includes title

Effect of election on devises to others.

abate on deficiency of assets, if the testator left real estate of which the widow is dowerable: *Howard v. Francis*, 30 N. J. Eq. 444, 447; *Chambers v. Davis*, 15 B. Mon. 522, 527; *Arrington v. Dortch*, 77 N. C. 367; *Steele v. Steele*, 64 Ala. 438, 462; *Hanna v. Palmer*, 6 Col. 156, 161; *Miller v. Buell*, 92 Ind. 482; *Kayser v. Hodopp*, 116 Ind. 428; *Warren v. Morris*, 4 Del. Ch. 289, 306.

¹ Brant's Will, 40 Mo. 266, 277.

² 1 Jarm. on Wills, * 466.

³ *Kempton*, Appellant, 23 Pick. 163, 164.

⁴ *Bullard v. Benson*, 31 Hun, 104; *Chamberlain v. Chamberlain*, 43 N. Y. 424, 443; *Kerr v. Dougherty*, 79 N. Y. 327, 345; *Matter of Benson*, 96 N. Y. 499.

⁵ *Jones v. Knappen*, 63 Vt. 391, 396; *Dean v. Hart*, 62 Ala. 308, 310; *Sandoe's Appeal*, 65 Pa. St. 314, 316; *Batstone's Estate*, 136 Pa. St. 307; *Evan's Estate*, 150 Pa. St. 212; *Jennings v. Jennings*, 21 Oh. St. 56, 80; *Timberlake v. Parish*, 5 Dana, 345, 352; *McCallister v. Brand*, 11

B. Mon. 370, 395; *Witherspoon v. Watts*, 18 S. C. 396, 423; *McReynolds v. Counts*, 9 Gratt. 242. So where a testator gave his wife a life estate in his property, with one-half the remainder to her heirs and the other half to a church, and she elects to take her dower, consisting (under a statute to that effect) of a fee in one-half the property, the church takes a fee in one-fourth: *Lilly v. Menke*, 143 Mo. 137.

⁶ *Lawrence's Appeal*, 49 Conn. 411, 424.

⁷ *Latta v. Brown*, 96 Tenn. 343, and cases cited; see also *Jones v. Knappen*, *supra*, and other authorities *supra*. But it is also held that this doctrine should not be applied to the extent of interfering with the rules of priority of legacies given in the will or by the law, and hence that residuary legatees and heirs of undisposed of property must bear the loss rather than preferred legacies: *Vance's Estate*, 141 Pa. St. 201; *Trustees Church v. Morris*, 99 Ky. 317.

to property specifically devised to another, and such devise is void, as contravening the homestead law, the widow's election to take dower will defeat such devise, and the devisee has no recourse upon the estate for its value.¹ A devise which is invalid (for instance, being against the Statute of Perpetuities by reason of an intervening estate given to the widow which prevents alienation within the period allowed) cannot become valid by reason of the widow's renunciation.²

§ 120. **Dower as affected by the Statute of Limitations, and by Estoppel.** — It was early settled in England, and the doctrine was adopted in many of the States, that the widow's remedy for the assignment of dower was not within the operation of the Statute of Limitations.³ By the English Statute of Limitations,⁴ however,

Right of dower barred after lapse of many years. suits for dower were limited to twenty years after the death of the husband; and similar statutes exist in some of the United States. Thus in Alabama the

remedy of the widow is barred, as against the alienees of the husband, after three years;⁵ and although the Statute of Limitations does not *proprio vigore* limit the time for the assignment of dower as against heirs, yet a court of equity, or even a court of law, upon principles of public policy and general convenience, may refuse to intervene for the relief of a dowress who has slept upon her rights.⁶ In Georgia dower is barred by a failure to apply for it

* within seven years from the death of the husband.⁷ In [*274] Indiana⁸ and Mississippi,⁹ where dower is now abolished,¹⁰ it was formerly held that dower was included in the general Statute of Limitations; and it is now so held in Illinois,¹¹ Iowa,¹² Kentucky,¹³

¹ Gainer v. Gates, 73 Iowa, 149.

² Dean v. Mulford, 102 Mich. 510.

³ Per Richardson, C. J., in Barnard v. Edwards, 4 N. H. 107, 109; Ridgway v. McAlpine, 31 Ala. 458, 462.

⁴ 3 & 4 Wm. IV. c. 27.

⁵ Code, 1896, § 1528.

⁶ Barksdale v. Garrett, 64 Ala. 277, 281. "When twenty years are suffered to elapse from the consummation of the right of dower," says Brickell, C. J., in this case, "in the absence of evidence which shows a recognition of the right by the parties whose estate is affected by it, without the assertion of the right by one of the appropriate remedies provided by law, a conclusive presumption of its extinguishment arises, not only in courts of equity, but in courts of law": citing earlier Alabama cases.

⁷ Code, 1895, § 4689, pl. 4; Doyal v. Doyal, 31 Ga. 193; but the time does not

run during a suspension of the general Statute of Limitations: McLaren v. Clark, 62 Ga. 106, 116.

⁸ Harding v. Presbyterian Church, 20 Ind. 71, 73.

⁹ Torrey v. Minor, 1 Sm. & M. Ch. 489, 494.

¹⁰ Ante, § 106.

¹¹ But no period short of seven years' adverse possession under claim and color of title, and the payment of taxes, will work a bar to the claim of dower, and the same strictness of proof as in actions of ejectment will be required to sustain the bar: Stowe v. Steele, 114 Ill. 382, 386; Brian v. Melton, 125 Ill. 647.

¹² Rice v. Nelson, 27 Iowa, 148, 156; but only when there is adverse possession: Berry v. Fuhman, 30 Iowa, 462, 464.

¹³ Kinsolving v. Pierce, 18 B. Mon. 782, 785.

Maine,¹ Michigan,² New Jersey,³ Ohio,⁴ Pennsylvania,⁵ and South Carolina.⁶ In Maryland,⁷ Montana,⁸ and North Carolina,⁹ the Statute of Limitations is held not to include dower; while in Massachusetts,¹⁰ New Hampshire,¹¹ New York,¹² and West Virginia,¹³ it is expressly included. In Missouri it was formerly held that the action for dower was not barred by the Statute of Limitations,¹⁴ but is now decided to be within the statute barring recovery of real estate after ten years.¹⁵ But although there be no statute of limitation applicable to dower, the staleness of a demand will in many States afford an equitable defence against a widow who has permitted twenty years or more to elapse before asserting her right.¹⁶

Although, as a general rule, the right of dower is not barred, at law, by collateral satisfaction,¹⁷ yet in equity the acceptance [* 275] of * anything in lieu thereof by the widow estops her from claiming dower in addition thereto.¹⁸ Thus it has been held that, if the wife join her husband in a deed conveying his real estate in fraud of creditors, and take a deed from the vendee, she thereby divests herself of her inchoate dower, although the conveyances are subsequently set aside at the suit of creditors;¹⁹ and if she join in her husband's deed, she is estopped from asserting dower against parties

Accepting property in lieu of dower estops the widow.

¹ *Durham v. Angier*, 20 Me. 242, 245; in this State the action is not barred until twenty years and one month after demand: *Chase v. Alley*, 83 Me. 234.

² *King v. Merritt*, 67 Mich. 194, 215, (limitation of twenty years).

³ *Conover v. Wright*, 6 N. J. Eq. 613, 615.

⁴ *Tuttle v. Wilson*, 10 Oh. 24; but where the widow is beyond seas, equity will not allow the staleness of her claim to bar dower: *Larrowe v. Beam*, 10 Oh. 498, 502.

⁵ *Care v. Keller*, 77 Pa. St. 487, 493. Though the land was alienated in the husband's lifetime, the widow is not barred until twenty-one years from his death: *Winters v. De Turk*, 133 Pa. St. 359.

⁶ *Caston v. Caston*, 2 Rich. Eq. 1, 3.

⁷ *Mitchell v. Farrish*, 69 Md. 235, 241. This case also holds that a period of four years and five months after the husband's death before suit brought does not constitute *laches*.

⁸ *Burt v. Cook Co.*, 10 Mont. 571; *Lynde v. Wakefield*, 19 Mont. 23.

⁹ *Campbell v. Murphy*, 2 Jones Eq. 357, 360.

¹⁰ Publ. St. 1882, p. 742, § 14. But if

the widow has been continuously occupying with the heirs the dowable lands, or has been receiving the rents, she will not be barred by this statute from having her dower assigned whenever the heirs seek to hold their shares in severalty: *Hastings v. Mace*, 157 Mass. 499; the statute applies, however, where the land passes to a *bona fide* purchaser without notice of her rights: *O'Gara v. Neylon*, 161 Mass. 140.

¹¹ *Robie v. Flanders*, 33 N. H. 524, 528.

¹² *Spoor v. Wells*, 3 Barb. Ch. 199, 203.

¹³ *Smith v. Wehrle*, 41 W. Va. 270.

¹⁴ *Littleton v. Patterson*, 32 Mo. 357, 365; *Johns v. Fenton*, 88 Mo. 64.

¹⁵ *Robinson v. Ware*, 94 Mo. 678; *Beard v. Hale*, 95 Mo. 16; *Farris v. Coleman*, 103 Mo. 352.

¹⁶ *Barksdale v. Garrett*, 64 Ala. 277, 281; *Gilbert v. Reynolds*, 51 Ill. 513, 516; *Kiddall v. Trimble*, 1 Md. Ch. 143, 150; *Carmichael v. Carmichael*, 5 Humph. 96, 99.

¹⁷ 2 Scrib. on Dower, 253, and authorities there cited.

¹⁸ See on the doctrine of election, *ante*, § 119.

¹⁹ *Meyer v. Mohr*, 19 Abb. Pr. 299, 305; but see as to dower in lands fraudulently conveyed, *ante*, § 113.

claiming under it.¹ So if the widow sell, as administratrix,² or join in the conveyance by the heirs,³ with covenant of good and perfect title, she is estopped from claiming dower in the estate sold.² In like manner, she will be estopped from asserting dower in property which by her conduct, or by means of fraudulent practices, she has induced others to buy under the belief that she waives her dower right;⁴ *a fortiori* if she enjoy and retain the fruits and benefits of her misguiding acts.⁵ But it is no defence to an action for dower that the defendant was a purchaser in good faith and had no notice of the widow's right;⁶ nor is the statement by the widow, that the purchaser would get a perfect and unquestionable title sufficient to estop her from claiming dower, if it could not have misled the purchaser.⁷ So the receipt of payments, under an agreement that, so long as the widow made no claim to dower, a certain sum should be paid to her annually, does not create an estoppel.⁸

§ 121. **Estate by the Curtesy.**—At common law (both at law and in equity) an estate of freehold for the term of his life devolves upon the husband on the death of his wife, known as the estate by the curtesy of England, in the lands and tenements of which she was seised in possession during coverture in fee simple or tail, provided lawful issue had been born to them capable of inheriting the estate.⁹ This estate, like dower, of which it is the * counterpart, was introduced into the several States, and [* 276] is in existence in most of them, either by special enactment of the legislature, or by the judicial recognition of its introduction with the common law. It has been held to exist in Alabama,¹⁰ Arkansas,¹¹ Connecticut,¹² Delaware,¹³ Illinois,¹⁴ Iowa,¹⁵ Kentucky,¹⁶ Maine,¹⁷ Maryland,¹⁸ Massachusetts,¹⁹ Michigan,²⁰ Minnesota,²¹ Mis-

¹ *Dundas v. Hitchcock*, 12 How. (U.S.) 256, 267; *Johnson v. Van Velsor*, 43 Mich. 208, 216; *Elmendorf v. Lockwood*, 57 N. Y. 322, 325.

² *Magee v. Mellon*, 23 Miss. 585.

³ *Reeves v. Brooks*, 80 Ala. 26, 29.

⁴ *Allen v. Allen*, 112 Ill. 323, 328; *Knox v. Higginbotham*, 75 Ga. 699, 701; *Dunlap v. Thomas*, 69 Iowa, 358; *Connelly v. Branstler*, 3 Bush, 702; *Sweeney v. Mallory*, 62 Mo. 485, 487. So accepting a lease in the lands will bar her from claiming dower during the term: *Heisen v. Heisen*, 145 Ill. 658.

⁵ *Hodges v. Powell*, 96 N. C. 64, 68; or if she receives a valuable consideration: *Smith v. Oglesby*, 33 S. C. 194.

⁶ *Cruise v. Billmire*, 69 Iowa, 397.

⁷ *Martien v. Norris*, 91 Mo. 465, 475; *Heller's Appeal*, 116 Pa. St. 534.

⁸ *Heller's Appeal*, 116 Pa. St. 534, 544.

⁹ 1 Washb. R. Prop. * 127 *et seq.*

¹⁰ *Wells v. Thompson*, 13 Ala. 793, 803.

¹¹ *McDaniel v. Grace*, 15 Ark. 465, 483.

¹² *Watson v. Watson*, 13 Conn. 83, 86.

¹³ 1 Washb. R. Prop. * 129.

¹⁴ *Monroe v. Van Meter*, 100 Ill. 347, 352. Curtesy is now abolished in Illinois. As to the husband's interest, see *infra*.

¹⁵ Curtesy is abolished in Iowa, but the husband takes "dower" in the wife's estate: *Hurleman v. Hazlett*, 55 Iowa, 256.

¹⁶ *Mackey v. Proctor*, 12 B. Mon. 433, 436; *Stewart v. Barclay*, 2 Bush, 550, 554; *Yankee v. Sweeney*, 85 Ky. 55.

¹⁷ 1 Washb. R. Prop. * 129.

¹⁸ *Rawlings v. Adams*, 7 Md. 26, 54.

¹⁹ *Shores v. Carley*, 8 Allen, 425.

²⁰ *Brown v. Clark*, 44 Mich. 309.

²¹ 1 Washb. R. Prop. * 129.

souri,¹ Nebraska,² New Hampshire,³ New Jersey,⁴ New York,⁵ North Carolina,⁶ Ohio,⁷ Oregon,⁸ Pennsylvania,⁹ Rhode Island,¹⁰ South Carolina,¹¹ Tennessee,¹² Vermont,¹³ Virginia,¹⁴ West Virginia,¹⁵ and Wisconsin.¹⁶ In California, Louisiana, Nevada, and Texas, estates by the curtesy and dower never existed,¹⁷ and in Arizona, Colorado, Connecticut, Indiana, Idaho, Iowa, Kansas, Minnesota, Mississippi, Nevada, North Dakota, South Dakota, Washington, and Wyoming, they have been abolished by statute.¹⁷ In Illinois curtesy is abolished, and the husband takes "dower" in his wife's realty.¹⁸

The requisites to entitle a husband to curtesy are, — 1. Lawful marriage; 2. Seisin of the wife during coverture of an estate of inheritance, either legal or equitable; 3. Birth of a child alive during the life of the wife;¹⁹ and 4. Death of the wife.

The seisin must, in general terms, be one of inheritance, but may be either legal or equitable;²⁰ whether there must be *actual*

¹ Tremmel v. Kleiboldt, 75 Mo. 255.

² Forbes v. Sweesy, 8 Neb. 520, 525.

³ Martin v. Swanton, 65 N. H. 10.

⁴ Cushing v. Blake, 30 N. J. Eq. 689.

⁵ Leach v. Leach, 21 Hun, 381.

⁶ Childers v. Bumgarner, 8 Jones L. 297; Nixon v. Williams, 95 N. C. 103.

⁷ Koltenbrock v. Cracraft, 36 Oh. St. 584.

⁸ Gilmore v. Gilmore, 7 Oreg. 374.

⁹ Commissioners v. Poor, 169 Pa. St. 116.

¹⁰ Briggs v. Titus, 13 R. I. 136.

¹¹ Withers v. Jenkins, 14 S. C. 597.

¹² Crumley v. Deake, 8 Baxt. 361.

¹³ Haynes v. Bourn, 42 Vt. 686.

¹⁴ Carpenter v. Garrett, 75 Va. 129. The husband has now only a modified tenancy by the curtesy: Browne v. Bockover, 84 Va. 424.

¹⁵ Winkler v. Winkler, 18 W. Va. 455.

¹⁶ 1 Washb. R. Prop. *129.

¹⁷ Ante, § 106.

¹⁸ Bedford v. Bedford, 136 Ill. 354, which may be changed by the legislature while inchoate: McNeer v. McNeer, 142 Ill. 388; and in general the same right is conferred as a widow had in her husband's realty: Heisen v. Heisen, 145 Ill. 658; but where the husband has an estate at common law by curtesy initiate the legislature cannot deprive him of such vested interest: Jackson v. Jackson, 144 Ill. 274.

¹⁹ In Pennsylvania the birth of a child is not, by provision of the statute, necessary: 1 Washb. R. Prop. *140, § 46; but the maxim of the common law in this

respect is *Mortuus exitus non est exitus*, and if the mother die before *exitus*, and that be by the Cæsarian operation, though it be born alive, it would not be sufficient to give the father curtesy: *Ib.*, referring to Co. Litt. 29 b; Marsellis v. Thalheimer, 2 Pai. 35, 42. But it is immaterial whether the child is born before or after the wife acquires her estate: Jackson v. Johnson, 5 Cow. 74, 102; Comer v. Chamberlain, 6 Allen, 166, 170.

²⁰ Robison v. Codman, 1 Sumn. 121, 128; Davis v. Mason, 1 Pet. 503, 508; Tremmel v. Kleiboldt, 6 Mo. App. 549, affirmed, 75 Mo. 255; Cornwell v. Orton, 126 Mo. 355; Robinson v. Lakenan, 28 Mo. App. 135, 140; Winkler v. Winkler, 18 W. Va. 455, 456; Cushing v. Blake, 30 N. J. Eq. 689; unless the devise or conveyance bar the right: Monroe v. Van Meter, 100 Ill. 347; Chapman v. Price, 83 Va. 392; and a conveyance by the husband to the wife for her separate use presumptively excludes his curtesy: Dugger v. Dugger, 84 Va. 130, 144; and see Haight v. Hall, 74 Wis. 152. The use of such words as "exclusively of her said husband," "in trust for the sole and separate use of my said daughter Adelaide without and free from the control of any husband," &c., in the conveyance to the wife, have been held not sufficient to deprive the husband of curtesy: Rank v. Rank, 121 Pa. St. 191; Dubs v. Dubs, 31 Pa. St. 149, citing numerous cases; Soltan v. Soltan, 93 Mo. 307. But see on this point, McCullough v. Valentine, 24 Neb. 215.

* seisin, as at common law, the authorities diverge in the [* 277] several States, most of them holding to the common-law rule;¹ but in some instances curtesy is allowed in reversions to which the wife was entitled, seisin in law being deemed sufficient.² Possession by some coparceners, or tenants in common, amicable to the others, is sufficient seisin in fact to vest an estate by the curtesy in the husbands of such others.³

Upon the birth of a child alive, the husband's right to curtesy in the lands of his wife is said to be initiate. In this condition it is both salable and assignable.⁴ It is consummated by the death of the wife, the freehold thereby devolving upon him *ipso facto*, in like manner as the estate of the ancestor upon the heir;⁵ no preliminary form is necessary to consummate his title.

§ 122. **Community Property.**—Community is the name by which, in the French law, a species of partnership is designated, contracted between a man and a woman when they are lawfully married to each other.⁶ It may be either *conventional*, when formed by express agreement in the marriage contract, or *legal*, arising out of the contract itself. It is necessary to consider, briefly at least, the nature and incidents of the property affected by the law of community, because, in the States * of [* 278] Arizona, California, Idaho, Louisiana, Nevada, Texas, and Washington its devolution upon the death of the husband or wife affects the common-law principles governing descent, dower, and curtesy.

Under the Code of Louisiana,⁷ every marriage superinduces of right partnership or community of acquests or gains, unless the contrary be stipulated, consisting of the profits of all the effects of which the husband has the administration

¹ *Carpenter v. Garrett*, 75 Va. 129, 134; *Stewart v. Barclay*, 2 Bush, 550, 553; *Reed v. Reed*, 3 Head, 491; *Taylor v. Gould*, 10 Barb. 388, 400; *Baker v. Oakwood*, 49 Hun, 414; *Orford v. Benton*, 36 N. H. 395, 402; *Malone v. McLaurin*, 40 Miss. 161, 163; *Shores v. Carley*, 8 Allen, 425; *Planters' Bank v. Davis*, 31 Ala. 626, 629; *Mackey v. Proctor*, 12 B. Mon. 433, 436; *Nixon v. Williams*, 95 N. C. 103.

² *McKee v. Cottle*, 6 Mo. App. 416; *Bush v. Bradley*, 4 Day, 298, 305. And it is generally held that a *feme covert* is considered in law as in fact possessed of the wild lands she may own, so as to support curtesy in her husband: *Jackson v. Sellick*, 8 John. 262, 270; *Davis v. Mason*, 1 Pet. 506; *Barr v. Galloway*, 1 McLean, 476, 480; *Gruen v. Anderson*, 8 Humph.

298, 322; *Day v. Cochran*, 24 Miss. 261, 277. In Kentucky, however, this exception is not allowed: it was first questioned in *Vanarsdall v. Fauntleroy*, 7 B. Mon. 401, 402, and denied in *Neely v. Butler*, 10 B. Mon. 48, 51.

³ *Carr v. Givens*, 9 Bush, 679; *Wass v. Bucknam*, 38 Me. 356, 360; *Vanarsdall v. Fauntleroy*, 7 B. Mon. 401.

⁴ *Briggs v. Titus*, 13 R. I. 136, citing and approving *In re Voting Laws*, 12 R. I. 586; *Martin v. Pepall*, 6 R. I. 92; *Gay v. Gay*, 123 Ill. 221 (holding a voluntary conveyance to be in fraud of creditors); *Lang v. Hitchcock*, 99 Ill. 550, 552, citing *Rose v. Sanderson*, 38 Ill. 247, and *Shortall v. Hineckley*, 31 Ill. 219.

⁵ *Watson v. Watson*, 13 Conn. 83, 85.

⁶ *Bouvier*, Law Dict., "Community."

⁷ Civ. Code, 1870, art. 2399 *et seq.*

and enjoyment, of the produce of the reciprocal industry of both husband and wife, and of the estates which they may acquire during coverture, either by donations to them jointly, or by purchase, subject to the debts contracted during the marriage, which must be acquitted out of the common fund, whilst the debts of husband or wife anterior to the marriage are payable out of their own individual effects. The husband administers the community property and may dispose of the same without the wife's consent; but she has her action against the husband's heirs if she prove that he has sold or otherwise disposed of it in fraud to her injury. Upon the dissolution of the marriage all the effects in the reciprocal possession of both husband and wife are presumed common effects or gains, unless it be satisfactorily proved which of them were brought in marriage, or have been given or inherited separately, and the community property is divided into two equal portions between the husband and wife, or between their heirs; the gains are equally divided, although one brought in marriage more than the other, or even where one brought nothing at all, including the fruits hanging by the roots on the hereditary or proper lands, and the young of cattle yet in gestation, but not the fruits of the paraphernal effects reserved to herself by the wife. The wife and her heirs and assigns may exonerate themselves from the debts contracted during the marriage by renouncing the gains, unless the wife took an active concern in the effects of the community. But she must make an inventory, and renounce within a proper time; and if she, being above the age of majority, permit judgment to pass against her as a partner, she loses the power of renouncing. If she die before making the inventory, the heirs shall be allowed another term of equal length, and thirty days in addition thereto, to deliberate. Creditors of the wife may attack the renunciation, if made to defraud them, and accept the community of gains in their own names.

[* 279] *The widow, whether she accept or renounce, has the right, during the delay granted her to deliberate, to receive her reasonable maintenance and that of her servants out of the provisions in store, and if there be none, to borrow on account of the common stock; and she owes no rent during such term for a house inhabited by her, belonging to the community or to the heirs of the husband, and if such house was rented, the rent is payable out of the common fund.

In California, upon the death of the wife the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree, which is subject to her testamentary disposition, and in the absence thereof goes to her descendants or heirs exclusive of the husband. Upon the death of the husband, one-half of the community property goes to the surviving wife,

Under Code of
California.

and the other half to his devisees or heirs, subject to debts, family allowance, and expenses of administration.¹ In case of the husband's death without descendants the wife is entitled to three-fourths.²

In Texas. In Texas the property owned before marriage by either husband or wife, or acquired during coverture by gift, devise, or descent, together with all the increase of lands (and formerly of slaves) so acquired, are his or her separate property; but all property acquired by either husband or wife during coverture, except in the manner aforesaid, is the common property of the husband and wife, and during coverture may be disposed of by the husband, and is liable for the debts of the husband and for the debts of the wife contracted during the marriage for necessities. Upon the dissolution of the marriage by death, the remainder of the common property goes to the survivor, if the deceased left no children, but if there be a child or children of the deceased, one-half shall go to the survivor, and the other half to such child or children. It is not necessary for the surviving husband to administer upon the community property, but he must file a full, fair, and complete inventory and appraisal of all the community property, and keep a fair and full account of all exchanges, sales, and other disposition of the community property, and upon final partition account to the legal heirs of his wife for their interest in the community and the increase and profits of the same. In default of such inventory, and in default of bond, * when required, administration may be [* 280] granted as in other cases. The same right is accorded to a surviving wife, until she marry again, in which case there must be administration.³

In Nevada. In Nevada the community property is defined like that in Texas;⁴ the wife is, however, required to file a full and complete inventory of her separate property in the office of the recorder of the county in which she resides, and if there be real estate, also in the counties in which the same lies, in default of which such property is *prima facie* not her separate property. The husband controls the community property, the wife her separate property. There is neither dower nor curtesy; but on the death of the wife the entire community property belongs, without administration, to the surviving husband, and on the death of the husband one-half of the community property goes to the surviving wife, and

¹ Civ. Code, §§ 1401, 1402; *Hollister v. Cordero*, 76 Cal. 649. The entire community, on the death of the husband, is administered as part of the husband's estate, and the surviving wife's interest goes to her by way of succession and distribution through the probate court: *In re Burdick*, 112 Cal. 387.

² *In re Boody*, 113 Cal. 682, affirmed, as to the law, in *Estate of Boody*, 119 Cal. 402.

³ *Pasch. Ann. Dig. art. 4641 et seq.*; *Rev. St. 1888*, §§ 2851 *et seq.*

⁴ *Gen. St. 1885*, § 508.

the other half to his devisees or heirs, subject to his debts, the family allowance, and expenses of administration.

In Arizona the rents and profits of the separate estate of either husband or wife are made by statute the common property, of which the husband has the entire control and management, with absolute power to dispose of the same as of his own separate estate; and property conveyed to the wife for moneyed consideration is presumed to be common property, which presumption may, however, be rebutted by proof that the property was purchased with her separate funds.¹ The homestead, if selected from the community property, vests on the death of the husband or wife in the survivor.² In Arizona.

The law is substantially the same in Idaho³ and Washington;⁴ in this latter State "the community," composed of husband and wife, is said to be purely a statute creation. . . . "It was plainly the intention of the legislature," says Dunbar, J., "to depart from the common law and breathe into legal existence a distinct and original creation, partaking somewhat of the nature of a partnership and of a corporation, but differing in some essentials from both; and this creature is termed 'a community.'"⁵ The whole community property is to be administered on the death of either spouse, and not merely of the half interest of the decedent;⁶ and if the administrator die before completing the administration, the estate should go to an administrator *de bonis non*; but where the survivor's administrator administers, such administration is merely irregular and not void, nor do the ordinary rules relating to the liability of executors *de son tort* apply.⁷ Washington.

It was decided in a Montana case, that a widow who has taken by virtue of the will more than one-half of the whole estate cannot claim any part of the other half on the ground that the whole estate was community property;⁸ but the statutory provision upon which the decision is made seems to have been omitted from the Constitution and Codes of 1895.⁹ Montana.

¹ Charalean v. Woffenden, 1 Ariz. 243, 262.

² Rev. St. 1882, § 1100.

³ "Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either." Rev. St. 1887, § 2829; including mining property held under a grant from the United States; and although the wife may never have been a resident of the territory [now State] of Idaho: Jacobson v. Bunker Hill Co., 2 Idaho, 363.

⁴ Code, 1896, § 2154. The community property is not liable for a personal judgment against the husband: Brotton v. Langert, 1 Wash. 73, Stiles, J., dissenting, p. 82.

⁵ Brotton v. Langert, *supra*, p. 78.

⁶ Ryan v. Ferguson, 3 Wash. 356.

⁷ *In re Hill's Estate*, 6 Wash. 285.

⁸ Chadwick v. Tatum, 9 Mont. 354, 369.

⁹ Civil Code, Title VII., "Succession;" Title I, Ch. III., "Husband and Wife."

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* CHAPTER XII.

ESTATES OF DECEASED PARTNERS.

§ 123. **Dissolution of the Partnership by the Death of one of its Members.**—The death of any member of a firm operates its

Death of one partner dissolves the partnership. dissolution as to all,¹ unless by the articles of copartnership or other agreement between the partners it is otherwise stipulated.² These agreements are, however, to be looked upon as bargains for the creation of a new partnership when the old one ceases to exist, since the partner who has died cannot by possibility continue a member of the firm, and though his executors or children become members, yet it cannot be the same firm as that of which he was a member.³ In the absence of an agreement of all the partners, the executors of a deceased partner

Administrator has no right but to demand accounting. have no right to become partners with the survivors of the firm, nor in any manner to interfere with the partnership business, save to represent the deceased for all purposes of accounting;⁴ but a testator may by his will so direct

¹ *Ames v. Downing*, 1 Bradf. 321, 325, with numerous authorities: *Knapp v. McBride*, 7 Ala. 19, 28; *Jenness v. Carleton*, 40 Mich. 343; 2 *Lindl. on Part.*, 1044; 1 *Coll. on Part.*, § 164; *Story on Part.*, § 5; *Toard v. Clum*, 31 Minn. 186.

² *Shaw, Appellant*, 81 Me. 207, 228; *Scholefield v. Eichelberger*, 7 Pet. 586, 594; *Laughlin v. Lorenz*, 48 Pa. St. 275, 282; *Gratz v. Bayard*, 11 S. & R. 41; *Edwards v. Thomas*, 66 Mo. 468, 481; *Espy v. Comer*, 76 Ala. 501, 503; *Leaf's Appeal*, 105 Pa. St. 505, 513. See, also, *Harbster's Appeal*, 125 Pa. St. 1, 10.

³ *Ruger, Ch. J.*, deciding the case of *Kennedy v. Porter*, 16 N. Y. St. 613, 627; *Matter of Laney*, 50 Hun, 15, 18, quoting from *Parsons on Part.* See *infra*, p. *282.

⁴ "And, unless restrained by special agreement, they have the power, by instituting a suit in chancery, to have the affairs of the partnership wound up in a manner which is generally ruinous to the other partners." 2 *Coll. on Part.*, § 623, p. 950.

The administrator has nothing to do with the deceased's interest in the firm except to see that no waste or fraud is committed in its management. Not until the survivor has paid off the firm debts, settled up the partnership, and turned over the proportionate share to the administrator of the deceased partner, does the liability of the latter for such share and its management commence: *Loomis v. Armstrong*, 63 Mich. 355, 361; *Valentine v. Wyser*, 123 Ind. 47, 56. See remarks of Lawrence, J., in *Miller v. Jones*, 39 Ill. 54, 60, on the relative rights and duties of the administrator of a deceased partner and the surviving partners; also *McKean v. Vick*, 108 Ill. 373, 377, showing that it is the duty of the administrator of the deceased partner to compel the surviving partner to settle up the partnership business without delay. To same effect: *Gwynne v. Estes*, 14 Lea. 662, 676. Only the personal representatives of the deceased partner—not the heirs—can maintain an

the continuance of the partnership after his death that the whole estate shall be liable for the post-mortuary debts, or only to the amount of his actual interest in the partnership debts at his decease.¹ It has been held in England,² and in some instances in the United States,³ that a court of equity will authorize the administrator of a

Testator may direct continuance of partnership.

Court of equity may direct continuance.

deceased partner to continue the partnership in

[* 282] * behalf of an infant heir; but this seems a dangerous power, perilous alike to the administrator, who is personally liable

for debts incurred in the prosecution of the business, and the beneficiaries of the estate, whose interests may be jeopardized by the vicissitudes of trade, although the administrator may exercise the utmost vigilance and caution. The extent of the liability of a deceased partner's estate for debts contracted after his death on behalf of the partnership will in all

Liability for debts created after testator's death.

cases depend upon the terms of the agreement in virtue of which it is continued;⁴ and while it is clear that, on general principles, no limitation of the extent of his assets to be employed in the partnership business can affect the rights of creditors existing at the time of his death,⁵ it is equally clear that only the most unambiguous language, showing the positive intention of the testator to render his general assets liable for debts contracted after his death, can

action for an accounting against the surviving partner: *Robertson v. Burrell*, 110 Cal. 568. In Missouri it is held that the statute provides "the administrator of the estate of the deceased partner an ample remedy for an accounting and settlement of the partnership estate; and that the administrator of the individual estate is remiss in his duties in not qualifying in due time so as to proceed under the statute against the surviving partner": *Goodson v. Goodson*, 140 Mo. 206, 216, 217. The personal representative of the deceased partner may in good faith settle the affairs of the firm with the survivor, and the same is conclusive: *Sage v. Woodin*, 66 N. Y. 578; *Sternberg v. Larkin*, 58 Kans. 201; especially with regard to the method of distribution: see § 127.

¹ Story on Part. § 319 *a*; *Burwell v. Cawood*, 2 How. 560, 577; *Davis v. Christian*, 15 Gratt. 11; *Exchange Bank v. Tracy*, 77 Mo. 594, 599.

² *Thompson v. Brown*, 4 John. Ch. 619, citing *Montagu on Part.* 287; *Sayer v. Bennett*, and *Barker v. Parker*, 1 T. R. 295.

³ Intimation by Chancellor Kent in *Thompson v. Brown*, *supra*; *Powell v.*

North, 3 Ind. 392, 395, citing as authority the case of *Thompson v. Brown*. and holding that a probate court, by virtue of its equity powers, may authorize the administrator of a deceased partner to carry on the partnership business in behalf of an infant heir.

⁴ As to the difference in the rights of creditors of a partnership directed to be continued by a testator's will, and of one continued in virtue of a partnership contract, see *Blodgett v. American National Bank*, 49 Conn. 9, 23; *dictum* of Johnson, J., in *Scholefield v. Eichelberger*, 7 Pet. 586, 594; *Davis v. Christian*, 15 Gratt. 11, 32, *et seq.* Where the provision in the partnership article is simply that the deceased partner's capital shall remain in the business, the executor is not admitted into the management of the business: *Wild v. Davenport*, 48 N. J. L. 129, 137; hence the executor of the deceased partner cannot, in such case, be sued as a member of a new firm: *Stewart v. Robinson*, 115 N. Y. 328, 343.

⁵ Coll. on Part., § 618; *Tomkins v. Tomkins*, 18 S. C. 1; *In re Clap*, 2 Low. Dec. 168.

justify the extension of the liability of his estate beyond the actual fund employed in the partnership at the time of his death.¹

The continuation of the partnership after the testator's death, in pursuance of the directions in the will, has the effect of creating a new partnership, of which the survivors and executors of the deceased partner are the members; and creditors of this new firm have no claim upon the * general assets of the testator, but only upon such assets as [* 283] are directed by the will to be therein employed.² And in

this new firm the executor pledges his own responsibility to the creditors, although he carries on the business not for his own benefit, but only for the benefit of children or legatees of the testator.³ Hence it must be optional with the executor, even where an apparent duty is imposed by the will, to refuse to connect himself with the business, and with still greater reason in the case of an administrator.⁴ If he carries out the request of the testator in continuing his business after his death, it is to be conducted in the manner in which the testator conducted it; and the general rule that if an executor sell on credit he must take security for the effects sold does not apply to sales made in the course of such business.⁵

¹ Story, J., in *Burwell v. Cawood*, 2 How. 560, 577; *Stewart v. Robinson*, 115 N. Y. 328; *Jacquin v. Buisson*, 11 How. Pr. 385, 389; *Brasfield v. French*, 59 Miss. 632, 636; *In re Clap*, 2 Low. 168; *Smith v. Ayer*, 101 U. S. 320, 330. In *Hart v. Anger*, 38 La. An. 341, a clause in the partnership articles that "in the event of the death of either of the parties to this act, it is to be optional with the survivor whether said copartnership shall continue or not," was held not to be enforceable. In England an executrix, who was directed to carry on her testator's partnership and exceeded her authority by employing assets therein to an extent not warranted by the will, was allowed, upon her and the surviving partner's bankruptcy, to prove for the excess so employed under their commission: *Ex parte Richardson*, Buck's Cas. in Bankr. 202, 209.

² *Pitkin v. Pitkin*, 7 Conn. 307, 311; *Stanwood v. Owen*, 14 Gray, 195; *Columbus Watch Co. v. Hodenpyl*, 61 Hun, 557, 560; *s. c.* on appeal, 135 N. Y. 430; *Wilcox v. Derickson*, 168 Pa. St. 331; *Vincent v. Martin*, 79 Ala. 540, 544.

³ 2 Coll. on Part., §§ 621, 622, citing *Garland ex parte*, in which Lord Eldon says (referring to an executor carrying on the partnership business under direction of

the will) that "the case of the executor is very hard. He becomes liable, as personally responsible, to the extent of all his own property; also in his person, and as he may be proceeded against as a bankrupt, though he is but a trustee. But he places himself in that situation by his own choice, judging for himself whether it is fit and safe to enter into that situation, and contract that sort of responsibility." *Wightman v. Townroe*, 1 Maule & Sel. 412 (in this case, however, the executor had no authority under the will to carry on the partnership); *Alsop v. Mather*, 8 Conn. 584, 587; *Citizen's M. Ins. Co. v. Ligon*, 59 Miss. 305, 314; *Insley v. Shire*, 54 Kans. 793; *Wild v. Davenport*, 48 N. J. L. 129. Obviously the executor does not become personally liable for debts contracted by the firm during the lifetime of the deceased partner: *Mattison v. Farnham*, 44 Minn. 95.

⁴ *Edgar v. Cook*, 4 Ala. 588, 590; *Jacquin v. Buisson*, 11 How. Pr. 385, 388; *Louisiana Bank v. Kenner*, 1 La. 384; *Berry v. Folkes*, 60 Miss. 576, 610, *et seq.*; see also *Buckingham v. Morrison*, 136 Ill. 437, 454; and a reasonable time within which to elect is given: *Wild v. Davenport*, 48 N. J. L. 129, 136.

⁵ *Cline's Appeal*, 106 Pa. St. 617.

§ 124. **Powers and Liabilities of Surviving Partners.**—Upon the dissolution of a firm by the death of one of its members, the survivors are, at common law, alone entitled to sue and liable to be sued in respect of debts owing to or by the firm.¹ They have the legal right to the possession and disposition of all partnership effects, for the purpose of paying the debts of the firm and distributing the residue to those entitled.² They become, in [*284] equity, *trustees and will be held liable as such for any conversion to their own use of the partnership funds or property in their hands;³ and if they continue the trade or business of the partnership with the partnership stock, it is at their own risk, and they will be liable, at the option of the representatives of the deceased partner, to account for the profits made thereby, or to be charged with interest upon the deceased partner's share of the surplus, besides bearing all the losses;⁴ but, except under particular circumstances, the party having the choice cannot elect the interest for one period and the profits for another, but must elect to take one or the other for the whole period.⁵ And if the profits are claimed, bad debts

Surviving partners to pay and collect debts.

Legal title to all property in surviving partners.

In trust to pay debts and distribute.

Continuation of partnership business at their own risk.

Representatives may demand interest, or share of profits.

¹ *Daby v. Ericsson*, 45 N. Y. 786, 790; *Murray v. Mumford*, 6 Cow. 441; *Voorhies v. Baxter*, 1 Abb. Pr. 43; *Osgood v. Spencer*, 2 H. & G. 133; *Walker v. Galbreath*, 3 Head, 315; *Roys v. Vilas*, 18 Wis. 169, 173.

² *Hanna v. Wray*, 77 Pa. St. 27; *Valentine v. Wysor*, 123 Ind. 47; *Hanson v. Metcalf*, 46 Minn. 25; *Andrews v. Brown*, 21 Ala. 437; *Tillotson v. Tillotson*, 34 Conn. 335, 358; *Territory v. Redding*, 1 Fla. 242; *Case v. Abeel*, 1 Pai. 393, 398; *Marlatt v. Scantland*, 19 Ark. 443, 445; *Gray v. Palmer*, 9 Cal. 616; *Holland v. Fuller*, 13 Ind. 195, 199; *Barry v. Briggs*, 22 Mich. 201, 206; *Dwinel v. Stone*, 30 Me. 384, 386; *Evans v. Evans*, 9 Paige, 178; *Heath v. Waters*, 40 Mich. 457; *Little v. McPherson*, 76 Ala. 552, 556; *Grim's Appeal*, 105 Pa. St. 375, 381; *Freeman v. Freeman*, 136 Mass. 260, 263; *Anderson v. Ackerman*, 88 Ind. 481, 485; *Dial v. Agnew*, 28 S. C. 454; *Word v. Word*, 90 Ala. 81; *State v. Withrow*, 141 Mo. 69.

³ *Renfrow v. Pearce*, 68 Ill. 125; *Costley v. Towles*, 46 Ala. 660; *Farley v. Moog*, 79 Ala. 148; *Bell v. McCoy*, 136 Mo. 552; *Insurance Co. v. Camp*, 71 Tex. 503. "The survivors do not take such assets as trustees, but, as survivors, hold the legal

title subject to such equitable rights as the representatives have in the due application of the proceeds": *Ruger, Ch. J.*, in *Williams v. Whedon*, 109 N. Y. 333, 338. The surviving partners are regarded as trustees of the firm's assets for the benefit of the firm's creditors, and such trust still attaches to such portion of the assets as are paid over to the representatives of the deceased partner before firm creditors are fully paid: *Hayward v. Burke*, 151 Ill. 121, 130.

⁴ *Story on Part.*, § 343; *Fithian v. Jones*, 12 Phil. 201; *Oliver v. Forrester*, 96 Ill. 315, 321 (see dissenting opinion, 325); *Brown's Appeal*, 89 Pa. St. 139, 147; *Freeman v. Freeman*, 142 Mass. 98; *Klotz v. Macready*, 39 La. An. 638. Where the surviving partner, in good faith, continued the management of a plantation and the slaves upon it, which were then lost by emancipation, it was held in a general settlement that he was not accountable for the value of the slaves, but should be charged the fair rental value of the property including that of the slaves while slaves: *Clay v. Field*, 138 U. S. 464.

⁵ *Goodburn v. Stevens*, 1 Md. Ch. 420, 430; *Beck v. Thompson*, 22 Nev. 109

must also be deducted; and if the continuance prove beneficial to the parties, the surviving partner should receive a reasonable allowance for his skill and industry in conducting the business,¹ although usually a surviving partner is not allowed compensation for winding up the partnership business,² unless the services rendered are extraordinary and perplexing in their nature, so as to justify an exception to the general rule,³ or stipulated in the articles of copartnership.⁴ The whole transaction should be adopted or repudiated.⁵ If, however, the business is carried on by the survivors with the assent of the executor or administrator of the deceased partner, the survivors are liable for the profits only, and if a loss transpires, they are not liable for either unless there was * negligence or carelessness in the [* 285] management of the business.⁶ Nor do the executors, who allow the share of the capital of their testator to remain in and be employed in the business of the partnership after his death, according to the testator's instruction in the will or the partnership agreement, thereby become liable as partners, or incur any responsibility.⁷ And since the liability to account for profits after dissolution rests upon the exposure of the stock of the outgoing partner to the risks of the new business, there is no liability to account when such partner has withdrawn as much or more than as much of the partnership funds as he is entitled to.⁸ If the business is carried on with the consent of some of those who represent the interest of the deceased partner, and against the consent of

(allowing the surviving partner credit for the cost of improvements made by him, where the estate elected to take the profits instead of interest).

¹ *Griggs v. Clark*, 23 Cal. 427, 430; see also *O'Reilly v. Brady*, 28 Ala. 530, 535; *Vanduzer v. McMillan*, 37 Ga. 299, 311; *Schenkl v. Dana*, 118 Mass. 236; *Freeman v. Freeman*, 142 Mass. 98; *Zell's Appeal*, 126 Pa. St. 339.

² *Beatty v. Wray*, 19 Pa. St. 516; *Loomis v. Armstrong*, 49 Mich. 521, 525; *Cooper v. Reid*, 2 Hill Ch. (S. C.) 549; *Terrell v. Rowland*, 86 Ky. 67; *Maynard v. Richards*, 166 Ill. 466, 480; *Cooper v. Merrihew*, *Riley Eq.* 166; *Starr v. Case*, 59 Iowa, 491, 503; *O'Neill v. Duff*, 11 Phila. 244, 246; *Brown's Appeal*, 89 Pa. St. 139; *Piper v. Smith*, 1 Head, 93; *Gregory v. Menefee*, 83 Mo. 413; *Scudder v. Ames*, 89 Mo. 496, 509; s. c. 142 Mo. 187. In Missouri the statute now makes provision for compensation: *Laws*, 1885,

p. 25. This statute applies only to commissions earned after its passage: *Tutt's Estate*, 41 Mo. App. 662.

³ *Hite v. Hite*, 1 B. Mon. 177, 179; *Maynard v. Richards*, 166 Ill. 466 and cases cited.

⁴ *Sangston v. Hack*, 52 Md. 173, 199.

⁵ *Washburn v. Goodman*, 17 Pick. 519, 526.

⁶ *Millard v. Ramsdell*, *Harr. (Mich.) Ch.* 373, 394. *Bradley, J.*, in *Clay v. Field*, 138 U. S. 464, 472. But in such case the executor or administrator ceases to have a lien upon the property as against subsequent creditors of the concern: *Hoyt v. Sprague*, 103 U. S. 613, 628; *Bell v. Hepworth*, 135 N. Y. 442, 447.

⁷ *Richter v. Poppenhusen*, 39 How. Pr. 82, 91; *Laughlin v. Lorenz*, 48 Pa. St. 275, 282; *Avery v. Myers*, 60 Miss. 367, 372.

⁸ *Hyde v. Easter*, 4 Md. Ch. 80, 84; *Taylor v. Hutchison*, 25 Gratt. 536, 548.

others, the earnings are to be divided according to the capital to which each was entitled, after deducting such share of them as is attributable to the skill and services of the surviving partner,¹ if there are no circumstances rendering such a rule unjust or inapplicable.²

A distinction has been drawn, with respect to the right of surviving partners, between property or effects in possession, of which the personal representatives of deceased partners become tenants in common with the survivors, and choses in action, debts, and other rights of action, which belong to the surviving partner.³ But this distinction is indicative of very slight, if any, practical difference: for as to the choses in action, the survivors become trustees thereof so soon as they recover thereon or reduce them to possession, for the benefit of the partnership, and the representatives of the deceased partner possess in equity the same right of sharing and participating in them as the deceased partner himself would if living;⁴ and as to their right to the effects in possession, it is sufficient to enable them to wind up the affairs of the firm, pay its debts, and distribute the residue. If necessary for such purpose, they may recover the partnership property even from the administrator of the deceased partner;⁵

Distinction between effects in possession and choses in action.

Surviving partners may recover from administrator,

¹ *Robinson v. Simmons*, 146 Mass. 167.

² Each case depends on its own circumstances; in a case where a surviving partner, believing he had a right to buy the deceased's interest in the partnership, received and accounted for such assets to the executors, one of whom he was himself, at a price they thought reasonable, but slightly under their real value, whereupon said surviving partner formed with others a new firm which purchased said assets, mingled them with new assets, and sold them, — it was held that it would be impracticable, even if just, to follow the small interest of the estate specifically, and ascertain how much it had earned in the subsequent business: *Denholm v. McKay*, 148 Mass. 434, 443. "It has in many cases been held," says the court in *Young v. Scoville*, 99 Iowa, 177, 186, "that the representative of the deceased partner may have the partnership settled and an accounting had as of a date later than the death of the intestate, and the partnership treated as a continuing one."

³ *Sto. on Part.*, § 346; *Wilson v. Soper*, 13 B. Mon. 411, 413.

⁴ *Sto. on Part.*, § 346 and authorities; *Maynard v. Richards*, 166 Ill. 466.

⁵ *Calvert v. Marlow*, 18 Ala. 67, 71; *Dwinel v. Stone*, 30 Me. 384; *Hawkins v. Capron*, 17 R. I. 679. But the surviving partner must prove the debt, like any other creditor of the deceased, and has no preference over other creditors: *Bird v. Bird*, 77 Me. 499. See also *Wilby v. Phinney*, 15 Mass. 111, 118, and *Johnson v. Ames*, 6 Pick. 330. Where the estate of the deceased partner is lawfully possessed of a fund which is the sole asset of the partnership, and nothing remains to be done except to state an account between the partners, it need not pay over that fund to the surviving partner: *Kutz v. Dreibulbis*, 126 Pa. St. 335, 340. Where partnership property was on dissolution left with one of the members, who died, and the executor converted it and placed the proceeds to the credit of the estate, the other partners may recover from the estate their share of the proceeds only; if the act of conversion was tortious or negligent, the executor is personally liable for any sum which the property was worth in excess of the price realized: *Bradley v. Brigham*, 144 Mass. 181.

and assign and transfer property for payment of debts.

Whether surviving partner may prefer creditors and make general assignment for benefit of creditors.

they may assign and transfer any chose in action,¹ or partnership property in possession.² Whether in paying the partnership debts the surviving partner may prefer one creditor over another, is held differently in different States. The common-law right to do so was asserted to exist in Missouri,³ until the statute was enacted requiring payment *pro rata* if the estate is insolvent,⁴ and still exists in some other States,⁵ but is emphatically denied in Colorado⁶ and Tennessee.⁷

In Kansas it is held that the statute prohibits a general assignment for the benefit of creditors by a surviving partner;⁸ and in Missouri it was likewise so held, after a full discussion of the authorities, three judges dissenting.⁹ If the surviving partner is compelled to pay a partnership debt in full, he has a right to contribution against the estate of the deceased partner¹⁰ so also for losses sustained by the firm, which claim is contingent until the firm business is settled, assets converted, and claims paid.¹¹

The executor or administrator of a surviving partner, who died with partnership effects in his possession while engaged in settling the partnership business, is entitled to the possession of such effects, and is charged with the duty of completing such settlement;¹² and he cannot be precluded from receiving compensation out of the partnership funds for his services in the performance of this duty.¹³

Executor or administrator of surviving partner entitled to partnership effects.

§ 125. Remedies of Partnership Creditors in Equity. — In equity,

¹ *Egberts v. Wood*, 3 Pai. 517; *Peyton v. Stratton*, 7 Gratt. 380, 384; *French v. Lovejoy*, 12 N. H. 458, 461; *Lindner v. Bank*, 49 Neb. 735.

² *Loeschigk v. Hatfield*, 51 N. Y. 660; *Bartlett v. Parks*, 1 Cush. 82; *Rose v. Gunn*, 79 Ala. 411, 415. But the surviving partner cannot exchange one kind of property for another: *Perin v. McGibben*, 6 U. S. App. 348, 371.

³ *Collier v. Cairns*, 6 Mo. App. 188, 190; *Denny v. Turner*, 2 Mo. App. 52, 55.

⁴ Laws, 1883, p. 22.

⁵ *Ely v. Horine*, 5 Dana, 398; *Loeschigk v. Hatfield*, *supra*; *Egberts v. Wood*, 3 Paige, 517; *Emerson v. Senter*, 118 U. S. 3; *First National Bank v. Parsons*, 128 Ind. 147; it was held in New York that an assignment for the benefit of creditors, in which preferences are created, cannot be made without the assent of the representatives of the deceased partner: *Nelson v. Tenney*, 36 Hun, 327; but later cases give the survivor an unqualified right to make an assignment with preferences of

certain creditors, and without the assent of the representatives of the deceased partner: *Williams v. Whedon*, 109 N. Y. 333 and cases cited.

⁶ *Salsbury v. Ellison*, 7 Col. 167, 169.

⁷ *Barcroft v. Snodgrass*, 1 Coldw. 430, 440; *Anderson v. Norton*, 15 Lea, 14, 28.

⁸ *Shattuck v. Chandler*, 40 Kans. 516, 520.

⁹ On the ground that to hold otherwise would be incompatible with the theory that the partnership should be administered in the probate court: *State v. Withrow*, 141 Mo. 69, 81.

¹⁰ *Harter v. Songer*, 138 Ind. 161.

¹¹ *Logan v. Dixon*, 73 Wis. 533.

¹² The administrator of the last survivor stands in the shoes of his last intestate, the relation between him and the representative of the partner first deceased being that of trustee and *cestui que trust*: *Galbraith v. Tracy*, 153 Ill. 54.

¹³ *Dayton v. Bartlett*, 38 Oh. St. 357, 361.

and under the statutes of most of the States, though not at common law, partnership creditors have the right, if the surviving partner is insolvent, to compel payment of their debts out of the deceased partner's estate to the full amount of their demands.¹ Story, in his [* 287] work on * Partnership, says that formerly recourse could be had against the estate of the deceased partner only when the survivor was insolvent or bankrupt, but that this doctrine has been overturned, and partnership creditors may now proceed against the estate of the deceased partner and enforce full payment of their demands, without waiting until the partnership affairs are wound up.² Such is the law in many States under their statutes, treating partnership debts as both joint and several; for instance, in Alabama,³ Arkansas,⁴ Connecticut,⁵ Florida,⁶ Indiana,⁷ Illinois,⁸ Iowa,⁹ Kansas,¹⁰ Michigan,¹¹ Mississippi,¹² Missouri,¹³ New Jersey,¹⁴ New Hampshire,¹⁵ Pennsylvania,¹⁶ Tennessee,¹⁷ and Texas.¹⁸ But in many others it is still necessary to aver and prove the insolvency of the surviving partner before the estate of the deceased can be held liable, among which may be reckoned Delaware,¹⁹ Georgia,²⁰ Louisiana,²¹ Nebraska,²² New York,²³ Ohio,²⁴ Virginia,²⁵ Wisconsin,²⁶ and, according to some old cases, North Carolina²⁷ and South Carolina.²⁸ This right is self-evidently confined to debts of the partnership existing at the time of the death; for it has already been shown,²⁹ that even where by the terms of the will of the deceased, or by force of the articles of

Partnership creditors may pursue estate of deceased partner,

whether the surviving partner is insolvent or not.

¹ 2 Coll. Part., § 611.

² Doggett v. Dill, 108 Ill. 560, 565, quoting Story on Part., § 362, and many English and American authorities: Nelson v. Hill, 5 How. 127, 133, approved in Lewis v. United States, 92 U. S. 618, 622.

³ Waldron v. Simmons, 28 Ala. 629; Rose v. Gunn, 79 Ala. 411.

⁴ McLain v. Carson, 4 Ark. 164, 166.

⁵ Camp v. Grant, 21 Conn. 41.

⁶ Fillyau v. Laverty, 3 Fla. 72, 101.

⁷ Hardy v. Overman, 36 Ind. 549.

⁸ Silverman v. Chase, 90 Ill. 37, 41, followed and approved in Doggett v. Dill, *supra*.

⁹ Ryerson v. Hendrie, 22 Iowa, 480, Dillon, J., dissenting, 484.

¹⁰ Stout v. Baker, 32 Kans. 113.

¹¹ Manning v. Williams, 2 Mich. 105; Van Kleeck v. McCabe, 87 Mich. 599, 605.

¹² Miller v. Northern Bank, 34 Miss. 412, 416; Irby v. Graham, 46 Miss. 425; Freeman v. Stewart, 41 Miss. 138, 141.

¹³ Griffin v. Samuel, 6 Mo. 50.

¹⁴ Wisham v. Lippincott, 9 N. J. Eq. 353; Green v. Butterworth, 45 N. J. Eq. 738; see also Buckingham v. Ludlum, 37 N. J. Eq. 137.

¹⁵ Bowker v. Smith, 48 N. H. 111, 113.

¹⁶ Moores' Appeals, 34 Pa. St. 411, 412; Williams' Appeal, 122 Pa. St. 472.

¹⁷ Saunders v. Wilder, 2 Head, 577.

¹⁸ Gaut v. Reed, 24 Tex. 46, 54.

¹⁹ Currey v. Warrington, 5 Harr. 147.

²⁰ Bennett v. Woolfolk, 15 Ga. 213, 221;

²¹ Knox v. Bates, 79 Ga. 425.

²² Dyer v. Drew, 14 La. An. 657; Jones v. Caperton, 15 La. An. 475.

²³ Leach v. Milburn, 14 Neb. 106; Bowen v. Crow, 16 Neb. 556.

²⁴ Voorhis v. Childs, 17 N. Y. 354; Hamersley v. Lambert, 2 John. Ch. 508.

²⁵ Horsey v. Heath, 5 Oh. 353, 355.

²⁶ Sale v. Dishman, 3 Leigh, 548, 551.

²⁷ Sherman v. Kreul, 42 Wis. 33, 38.

²⁸ Burgwin v. Hostler, 1 Tayl. 75 (2d ed.).

²⁹ Philson v. Bampfield, 1 Brev. 202.

³⁰ *Ante*, § 123.

copartnership, the business is continued by the survivors together with the executor or other personal representative, a new partnership is in reality formed, the liabilities of * which [* 288] are entirely distinct from those of the old firm. No notice of the dissolution of the firm by the death of one of its members is necessary to discharge the estate of the decedent from liability for any subsequent transaction, except, perhaps, where the surviving partners, or one of them, are executors of the deceased partner, and the business is continued under the original articles of copartnership.¹ And so the same acts of the creditor which operate in discharge of the surviving or of a retiring partner will be equally effective to discharge a deceased partner's estate.²

As the personal representatives of a deceased partner may call on the survivors for an account of the partnership affairs,³ so the creditors may proceed against the survivors, as well as against the representatives of the deceased, in order to obtain payment of their debts out of the assets of the deceased partner; but the separate creditors, legatees, and next of kin of the deceased partner have no *locus standi* against the surviving partner, but only against the executors or administrators of the deceased, unless there be collusion between these persons, or circumstances exist which prevent the representatives themselves from obtaining a decree for an accounting.⁴ If the administrator fails to compel a speedy accounting by the surviving partner, he is himself guilty of *laches*.⁵ It is to be remembered, in connection with this question, that, as a general rule, partnership creditors have a primary claim upon partnership assets, to the exclusion of the creditors of individual partners, until the partnership debts are paid, and *vice versa*;⁶ and that they may enforce their rights in the probate courts,

¹ Story on Part., § 343, and note citing *Vulliamy v. Noble*, 3 Mer. 593, 614; Coll. on Part., §§ 24, 613; *Marlett v. Jackman*, 3 Allen, 287, 290; *Price v. Mathews*, 14 La. An. 11. See *Dean v. Plunkett*, 136 Mass. 195, where the surviving partner carried on the business as agent of the new firm under the old name, and the firm was held liable for the agent's contracts.

² 2 Coll. on Part., § 614, and authorities. But a discharge in bankruptcy of the surviving partner adjudged bankrupt on an act of bankruptcy committed by him in the administration of the assets of the dissolved partnership, does not discharge the estate of the deceased partner from liability: *In re Stevens*, 1 Sawyer, 397; so the statute may affect the question of the effect

of a release: *Hanson v. Metcalf*, 46 Minn. 25, 30.

³ *Ante*, § 123.

⁴ Coll. on Part., §§ 288, 348.

⁵ *McKean v. Vick*, 108 Ill. 373; *Barcroft v. Snodgrass*, 1 Coldw. 441; *Gwynne v. Estes*, 14 Lea, 662, 676; see *ante*, § 123, p. * 281, note 4.

⁶ *Keese v. Coleman*, 72 Ga. 658; *Stone v. Carey*, 42 W. Va. 276; *Warren v. Farmer*, 100 Ind. 593, 595; *Farley v. Moog*, 79 Ala. 148; *Hayward v. Burke*, 151 Ill. 121; *Banks v. Steele*, 27 Neb. 138; *Claffin v. Behr*, 89 Ala. 503. Statutes looking to the classification of demands against the estate of a deceased member of a partnership and the distribution of the estate have no effect whatever on such priority.

where these have jurisdiction over partnership estates, as well as in equity; the procedure being pointed out by the statute giving such jurisdiction.¹

§ 126. **Effect of Dissolution on Partnership Real Estate.** — It is now well recognized, that as between copartners there is in reality no difference whether the partnership property held for the purposes of trade or business consists of personal or real estate, or of both, so far as their ultimate

Real estate treated as personally in equity.

[* 289] * rights and interests are concerned.² However the title may stand at law, real estate belonging to a partnership will in equity be treated like its personal funds, disposable and distributable accordingly; and the parties in whose names it stands, as owners of the legal title, will be held to be trustees of the partnership, accountable accordingly. Hence in equity, in case of the death of one partner, there is no survivorship in the real estate of the partnership, but his share will go, after payment of partnership debts, to his proper representatives;³ but all real estate purchased with partnership funds for the use of the firm, and employed in the partnership business, is in equity regarded as assets of the partnership, and will be applied to the liquidation of partnership debts in preference to the debts of individual members of the firm.⁴ The dower interest of the widow of a de-

No survivorship in real estate on dissolution by death.

Widow's dower in partnership real estate.

Hundley v. Farris, 103 Mo. 78, 86, and cases cited.

¹ State v. Shacklett, 73 Mo. App. 265.

² Story on Part., § 92.

³ Story on Part., § 92; 1 Coll. on Part., § 115, note, p. 219; Shanks v. Klein, 104 U. S. 18.

⁴ Ross v. Henderson, 77 N. C. 170, 172; Buchan v. Sumner, 2 Barb. Ch. 165, 200, in which Chancellor Walworth formulates the rule as follows: Real estate purchased with partnership funds, or for the use of the firm, is, in equity, chargeable with the debts of the partnership, and with any balance which may be due from one copartner to another upon the winding up of the affairs of the firm; secondly, as between the personal representatives and the heirs at law of a deceased partner, his share of the surplus of the real estate of the copartnership, which remains after payment of its debts and adjusting all the equitable claims of the different members of the firm as between themselves, is treated as real estate. This view was announced in an elaborate opinion upon a thorough review of the American authorities, which

he found somewhat conflicting, and was approved by the New York Court of Appeals in *Collumb v. Read*, 24 N. Y. 505, 512; *Rice v. McMartin*, 39 Conn. 573, 575; *Darrow v. Calkins*, 154 N. Y. 503; *Carlisle v. Mulhern*, 19 Mo. 56; *Matthews v. Hunter*, 67 Mo. 293, 295; *Martin v. Morris*, 62 Wis. 418, 427; *Espy v. Comer*, 76 Ala. 501; *Leaf's Appeal*, 105 Pa. St. 505; *Messer v. Messer*, 59 N. H. 375, 377; and see the cases of *Coles v. Coles*, 15 Johns. 159, *Dyer v. Clark*, 5 Met. (Mass.) 562, with collection of authorities in 1 Am. Lead. Cas. 484 *et seq.*; also *Hanson v. Metcalf*, 46 Minn. 25 (holding that an assignment by the survivor will pass the equitable interest in the realty of the firm, though standing in the name of the deceased partner, and that the purchaser could compel the conveyance of the legal title); *Van Aken v. Clark*, 82 Iowa, 256 (holding, under somewhat similar circumstances, that the heirs need not be made parties); *Sternberg v. Larkin*, 58 Kans. 201 (holding that on settlement with the estate's representative to that effect, the realty goes to the surviving partner without a formal conveyance).

ceased partner depends upon the contingency whether any portion of the proceeds of sale of partnership real estate remains to the share of her deceased husband after the payment of all the partnership debts, and advances made by the other partners; hence she has no claim to dower in the lands sold or mortgaged by the firm, although she did not join in the sale, but may have a dower interest in the balance of the purchase-money so remaining, which is then treated as real estate.¹ So each partner has an equitable

Equity of partner superior to dower and rights of heirs and devisees.

* interest in that portion of the legal estate held [* 290]

by the other, until all the debts obligatory on the firm, including advances by any of the partners to the firm, are paid, and the rights of the deceased partner's widow, legal representatives, heirs, and creditors are postponed to

such payment.² But such partnership real estate as may not be required for the payment of partnership debts or the adjustment of balances between the partners is, in the settlement of the estate of a deceased partner, generally,—at least in cases where the partners have not by either an express or implied agreement indicated an intention to convert the land into personal estate,³—treated as realty;⁴ although in some cases, both in England and America, the character of personality, once attaching to such property by reason of having been purchased with partnership funds or used for partnership purposes, is held to continue until final distribution.⁵

Firm speculating in real estate.

Whether an agreement to buy and sell lands and share in the profits of the sale converts the land absolutely into personalty, has been held both ways.⁶ The current of authorities

¹ Howard v. Priest, 5 Met. (Mass.) 582; Husson v. Neil, 41 Ind. 504, 510; Loubat v. Nourse, 5 Fla. 350, 358; Greene v. Greene, 1 Ohio, 535, 542; Sumner v. Hampson, 8 Ohio, 328, 364; Duhring v. Duhring, 20 Mo. 174, 180, *et seq.*; Richardson v. Wyatt, 2 Desaus. 471, 482; Gilbraith v. Gedge, 16 B. Mon. 631; Wooldridge v. Wilkins, 3 How. (Miss.) 360, 371, *et seq.*; Cobble v. Tomlinson, 50 Ind. 550, 554; Simpson v. Leech, 86 Ill. 286; Brewer v. Browne, 68 Ala. 210, 213.

² Dyer v. Clark, 5 Met. (Mass.) 562, 575; Holton v. Guinn, 65 Fed. Rep. 450; Shearer v. Paine, 12 Allen, 289; Pierce v. Trigg, 10 Leigh, 406, 421, *et seq.*; but see on this point, Bush v. Clark, 127 Mass. 111, as to the distinction drawn in Massachusetts between personalty and real estate, *post*, p. * 293.

³ As, for instance, in Davis v. Smith, 82 Ala. 198; Perin v. Megibben, 6 U. S. App. 348, 369, citing Kentucky cases;

Darrow v. Calkins, 154 N. Y. 503. See *ante*, § 111, p. * 235.

⁴ Wilcox v. Wilcox, 13 Allen, 252; Harris v. Harris, 153 Mass. 439, 443; Dilworth v. Mayfield, 36 Miss. 40, 51; Buckley v. Buckley, 11 Barb. 43, 75; Buchan v. Sumner, *supra*; Wooldridge v. Wilkins, 3 How. (Miss.) 360, 371, *et seq.*; Goodburn v. Stevens, 5 Gill, 1, 26; Markham v. Merrett, 7 How. (Miss.) 437, 446; Hale v. Plummer, 6 Ind. 121, 123; Yeatman v. Woods, 6 Yerg. 20, approved in Piper v. Smith, 1 Head, 93, 97, and Williamson v. Fontain, 7 Baxt. 212, 214; Espy v. Comer, 76 Ala. 501, 505; Leaf's Appeal, 105 Pa. St. 505; Martin v. Morris, 62 Wis. 418; Brewer v. Browne, 68 Ala. 210.

⁵ Ludlow v. Cooper, 4 Ohio St. 1, 8, *et seq.*; Nicoll v. Ogden, 29 Ill. 323; Cos-ter v. Clarke, 3 Edw. Ch. 428; Hoxie v. Carr, 1 Sumn. 173

⁶ Negatively in Mississippi: Markham

seems to regard lands bought by a firm engaged in the business of speculating in real estate as personal property for all partnership purposes; but after winding up the partnership and fully settling its affairs, the realty then remaining on hand resumes its legal characteristics.¹

§ 127. **Distribution of Partnership Effects.**—Upon the payment of all the partnership debts and expenses of liquidation, a specific division of all the remaining assets may be made between the surviving partners and the personal representatives of the deceased partner, if they so agree.² But each party may, in the absence of such an agreement, and where [* 291] the * partnership contract stipulates no division in a different manner, insist on a sale of the joint stock;³ and where a court of equity winds up the concerns of a partnership it is usually done by a sale of the property, whether real of personal, and a conversion of it into money;⁴ but there may be cases in which the peculiar circumstances would make a sale injurious, and where the true interest of all parties may be better preserved and protected without it.⁵ It seems to be understood that a sale at public auction is most favored, because at such a sale all interested parties may be present,

Specific
division.

Sale of joint
stock.

Sale may be
dispensed with.

Sale at public
auction.

v. Merrett, supra; affirmatively in Ohio *Ludlow v. Cooper*, 4 Oh. St. 1, 9; New York: *Coster v. Clarke, supra*.

¹ *Young v. Thrasher*, 115 Mo. 222; *Ravolsky v. Brown*, 92 Ala. 522, 528; and see also *Mallery v. Russell*, 71 Iowa, 63.

² *Roys v. Vilas*, 18 Wis. 169, 174; *Case v. Abeel*, 1 Pai. 393, 398; *Ludlow v. Cooper*, 4 Oh. St. 1; *Sage v. Woodin*, 66 N. Y. 578, 581. The executor of a deceased partner, if not a member of the firm, may agree with the survivor that the share of the deceased may be ascertained in a particular way, or be taken at a certain value; and a final accounting and settlement between them made in good faith cannot be overhauled; *per Fuller, J.*, in *Holladay v. Land Co.*, 6 U. S. C. C. A. 560, 571; s. c. 18 U. S. A. 308; especially when receiving the sanction of the court: *Sternberg v. Larkin*, 58 Kans. 201 (holding that such compromises should be favored).

³ *Freeman v. Freeman*, 136 Mass. 260. The partnership articles may give the surviving partner an option to take the firm assets at a valuation to be determined in a certain manner therein specified: *Rohrbacher's Estate*, 168 Pa. St. 158; *Rankin v. Newman*, 114 Cal. 635 and

cases cited; and where the survivor is given a length of time within which to elect, the profits up to the time he makes his election belong to the old firm: *Hull v. Cartledge*, 18 N. Y. App. D. 54.

⁴ 3 Kent Com. 64; Story on Part., § 347; 1 Coll. on Part., § 331; Gow on Part., *234; *Evans v. Evans*, 9 Pai. 178, 181; *Sigourney v. Munn*, 7 Conn. 11, 21; *Harper v. Lamping*, 33 Cal. 641, 649; *Dickinson v. Dickinson*, 29 Conn. 601; *Lyman v. Lyman*, 2 Paine, 11, 39, *et seq.* Surviving partners "cannot take the property of the firm to themselves at an estimated value without the consent of the representatives of the deceased partner": *Ogden v. Astor*, 4 Sandf. 311, 313, 334; *Freeman v. Freeman*, 136 Mass. 260, 263; *Denholm v. McKay*, 148 Mass. 434.

⁵ Pars. on Part., *525. Where the object of the partnership is to carry out a contract unfinished at the death of one partner, the court will not necessarily order the property sold, nor the share of the deceased partner in it ascertained by valuation, but leave the surviving partner to complete the contract, and postpone the account until it is completed: *Maynard v. Richards*, 166 Ill. 466, *per Magruder, Ch. J.*, 479.

But no conclusive rule as to method of sale. and bid to prevent a sacrifice of the stock; but there is no conclusive rule upon the subject, and the circumstances of each case must suggest the best course to be adopted.¹ The representatives of the deceased partner may sell the interest of the latter to third persons, or to the survivor, if the sale is fair and honest;² but not where the surviving partner is also executor or administrator of the deceased partner.³ The surviving partner cannot shield himself from responsibility for the true value of partnership property bought secretly and indirectly by himself, by showing that the sale was under judicial authority; nor where bidders were deterred for his benefit from bidding, although in consequence of deceit he did not obtain the property.⁴ But the court may, upon a proper showing, permit the surviving partner to retain the assets upon payment of their full value.⁵

The good will of a firm dissolved by the death of one of its members has often a marketable value, and in such case it is liable to be sold for the benefit of all the partners, like any other property of the firm. In such case it must be * taken into consideration in the valuation of the stock,⁶ and [*292] the proceeds of its sale become assets for the payment of debts or distribution between the deceased and surviving partners. But it is not always either valuable or salable. It is described as the sum which a person would be willing to give for the chance of being able to keep the trade established at a particular place,⁷ or rather it is the price to be paid for the advantage of carrying on business either on the premises or with the stock of the old firm, or connected therewith by name, or in some manner attracting the customers of the old to the new business. Upon the sale of an established business, its good will has obviously a marketable value;⁸ but this depends largely, if not entirely, on the absence of competition on the part of those by whom the business has been previously carried on. Hence, since a surviving partner is under no obligation either to retire from business merely because the partnership is dissolved, or to carry on the old business so as to preserve its good will until the final winding up of the partnership affairs,⁹ its market

¹ Taylor v. Hutchison, 25 Gratt. 536.

² Case v. Abeel, 1 Pai. 393, 398; Kimball v. Lincoln, 99 Ill. 578 (but the survivor cannot become purchaser at his own sale: p. 585); see Grim's Appeal, 105 Pa. St. 375, 382; Valentine v. Wysor, 123 Ind. 47; Holladay v. Land Co., 6 U. S. C. C. A. 560; s. c. 18 U. S. A. 308.

³ Case v. Abeel, *supra*; Nelson v. Hayner, 66 Ill. 487, 493. But the partnership articles may provide for an option in favor of the survivor: see note 3, p. *291, *supra*.

⁴ Klotz v. Macready, 39 La. An. 638.

⁵ Sheppard v. Boggs, 9 Neb. 257, 262.

This course is in many cases the best or only expedient to avert serious loss, especially of the value of good will.

⁶ Case v. Abeel, 1 Pai. 393, 401; Dayton v. Wilkes, 17 How. Pr. 510, 511; Sheppard v. Boggs, 9 Neb. 257, 261; Rammlersberg v. Mitchell, 29 Oh. St. 22, 54; Platt v. Platt, 42 Conn. 330, 347.

⁷ 1 Coll. on Part., p. 238, note 1.

⁸ Lindl. on Part., *859.

⁹ Lewis v. Langdon, 7 Sim. 421, 425; Howe v. Searing, 10 Abb. Pr. 264, 271.

value is often destroyed or inconsiderable.¹ So too the sale of an establishment *in toto* will carry with it the good will to the purchaser;² if a lease, the property of a partnership, be sold, the good will passes with it to the person purchasing.³ In such cases the good will is included in or constitutes a part of the value of the thing sold, and it follows that it can be valued or sold only in connection with such property; the stock or business sold is enhanced in value by the estimated value of such good will.⁴ Lindley in his work on Partnership intimates that good will is generally valued at so many years' purchase on the amount of profits,⁵ and in an English case⁶ it was remarked that it was equal to about one year's [* 293] purchase. * Where the good will is the subject of a special contract, or arises out of it, it assumes a more tangible shape, and may be valued and assigned with the rest of the effects; it is described by Collyer as "an advantage arising from the fact of sole ownership to the *exclusion* of other persons."⁷ Good will of this kind, being a valuable addition to a trade, cannot be implied from the general words "stock, effects, &c.," but must be created by some appropriate words;⁸ and it has been held that the naked sale of the good will of a business does not transfer a right to the use of the vendor's name of trade.⁹ Nor can a surviving partner, without the consent of the representatives of the deceased partner, use the firm name or the name of the deceased partner in continuing the business.¹⁰ Where by the partnership articles the surviving partners, at a specified valuation or price, the mode of payment of which to the deceased partner's estate is pointed out, may acquire the deceased's interest and the right to continue the business under the firm name, the good will of the business passes with it.¹¹

It appears to be generally held that partnership assets must first be applied to the payment of partnership debts and the advances of either partner, before the other partner or any one through him has any claim on them.¹² This principle would, of course, exclude

et seq. And he need not account to the representative of the deceased partner for the good will, though he do business in the same place : *Lobeck v. Lee*, 37 Neb. 158.

¹ *Scudder v. Ames*, 142 Mo. 187; *Davies v. Hodgson*, 25 Beav. 177, 183, *et seq.*

² *Marten v. Van Schaick*, 4 Pai. 479. In this case the receiver appointed upon application of a partner was directed to continue the publication of a political paper until a sale could be effected, so that the good will might be saved to the purchaser, and the full value of the establishment secured to the partners. See also *Williams v. Wilson*, 4 Sandf. Ch. 379, 380.

³ *Dougherty v. Van Nostrand*, 1 Hoff. Ch. 68, 70.

⁴ 1 Coll. on Part., § 117, p. 241.

⁵ *Lindl. on Part.*, * 863.

⁶ *Davies v. Hodgson*, *supra*.

⁷ 1 Coll. on Part., p. 237.

⁸ *Ib.*, pp. 238 *et seq.*, with authorities.

⁹ *Howe v. Searing*, *supra*, Moncrief, J., dissenting: see 10 Abb. Pr. 264, 276; *Comstock v. White*, reported as a note to *Howe v. Searing*, p. 264. See also *Matter of Randell*, 2 Connolly, 29.

¹⁰ *Fenn v. Bolles*, 7 Abb. Pr. 202.

¹¹ *Rankin v. Newman*, 114 Cal. 635.

¹² *Valentine v. Wysor*, 123 Ind. 47; *Keese v. Coleman*, 72 Ga. 658; *Preston v.*

the right of the widow to an allowance out of the partnership assets,¹ as well as any other person claiming as his legal representative.² But in Massachusetts it is held that the probate court may make an allowance to the widow of a deceased partner out of the partnership assets in the hands of a surviving partner at the time of his death, although these are insufficient to pay the partnership debts.³

* It need hardly be suggested that the property of a firm, [*294] if all its members die intestate, without heirs or known next of kin, escheats in the same manner to the State as the property of an individual.⁴

Statutory powers of probate courts over partnership estates. In Maine.

§ 128. **Jurisdiction of Probate Courts over Partnership Estates.**—In several of the States provision is made by statute for the winding up of partnership estates under the jurisdiction of the probate court. In Maine the executor or administrator of a deceased part-

Colby, 117 Ill. 477, 483; Farley v. Moog, 79 Ala. 148; Ross v. Carson, 32 Mo. App. 148; Lyons v. Murray, 95 Mo. 23; Hart v. Hart, 31 W. Va. 688, 696. The judgment lien of a separate creditor on partnership lands, though held in the individual name of the debtor, is postponed to the equity of a firm creditor whose claim accrued during the existence of the partnership, though subsequent to the time when such lien attached: Page v. Thomas, 43 Oh. St. 38. But *bona fide* purchasers for value, without notice that same was partnership property, are protected: *Ib.*, p. 44. *Aliter* if they have notice: Norwalk Bank v. Sawyer, 38 Oh. St. 339, 343. The converse of the proposition announced in the text is equally true, viz.: individual creditors have the prior right to individual assets (*ante*, § 125, last paragraph) and statutes with reference to classification of demands do not alter the rule: Hundley v. Farris, 103 Mo. 78.

¹ Julian v. Wrightsman, 73 Mo. 569, 571.

² Thomp., Homest. & Ex., § 194; Pond v. Kimball, 101 Mass. 105.

³ Bush v. Clark, 127 Mass. 111. In reasoning upon the proposition before the court, it is assumed that the surviving partner holds the partnership assets, "and not as a trustee" (p. 112); and "as it is personal estate of the deceased, it is liable to diminution by the expenses of administration, and by allowance to the widow." "And when such allowance is made, what-

ever part of the estate is included in it ceases to be assets for the payment of debts." (p. 113.) "This rule applies, whether the estate came to the intestate as surviving member of a firm, or had been his separate estate." (p. 114.) Granting that the surviving partner holds the partnership assets "*not in trust*," the result reached in this case is inevitable; but there may be some difficulty in reconciling this view with earlier Massachusetts cases (see Pond v. Kimball, 101 Mass. 105), and with authorities in general. On principle, it seems that the exemption of a certain amount of property, to protect the widow and infant children of a deceased partner from want and suffering, may be as necessary and just against the creditors of a partnership, as against those of an individual; a similar view has been enforced in proceedings against a bankrupt firm: says Treat, J., in *Young in re*, 3 N. B. Reg. 440, "The policy of exemptions, and the legal rules on which they rest, modify the strict technical rules by which rights of creditors are otherwise enforceable." He accordingly allowed the exemption to which an individual is entitled under the law of Missouri to be divided between the two partners. Other similar cases are mentioned by Thompson in his work on Homesteads and Exemptions, §§ 214 *et seq.*

⁴ Commonwealth v. No. Am. Land Co., 57 Pa. St. 102.

ner is required to include in his inventory the property of the partnership, which must be appraised as in other cases, and to retain and administer such property unless the survivor give bond for the faithful and diligent closing up of the partnership estate.¹ Under this statute it is held that a sale by the surviving partner who has not given such bond is void, and notes given for goods so sold are without consideration;² and when the administrator has given the bond, which on citation the survivor refused to give, he is entitled to the partnership property against an officer who has attached it in an action by a creditor of the firm against the survivor.³ If the partnership is continued after the death of a member, by virtue of the articles of agreement entered into before such member's death, it is held that the operation of the statute is postponed, at least until a dissolution does take place.⁴

The same statute, substantially, was enacted in Oregon.⁵ A doubt was expressed in this State whether, under the statute, a surviving partner could transfer real estate, or any interest in real estate, held for partnership purposes, without an order of the probate court, and without giving the bond required by the statute.⁶ But in a later case it was held that the probate court took no jurisdiction from the statute to partition real [* 295] estate * belonging to a partnership under administration, and that it is the province of a court of equity so to do.⁷

A similar statute exists in Kansas.⁸ It was held in this State that where the administrator of the deceased partner's estate gives the additional bond required of him on taking charge of the partnership estate, the two administrations are entirely separate and distinct; that the sureties on the administration bond in the estate of the deceased partner are not liable for any acts of the administrator concerning the partnership estate; that the funds derived from the one estate are primarily liable for the individual debts of the deceased, and those of the other for the debts of the firm.⁹ Also, that an action will lie by a creditor of the firm on the

¹ Rev. St. 1883, ch. 69.

² Cook v. Lewis, 36 Me. 340, 345; Hill v. Treat, 67 Me. 501.

³ Putnam v. Parker, 55 Me. 235.

⁴ Shaw, Appellant, 81 Me. 207, 229.

⁵ Code, 1887, §§ 1101 *et seq.*

⁶ Knott v. Stephens, 3 Ore. 269, 273.

But the case went off on a question of fact.

⁷ Burnside v. Savier, 6 Ore. 154, 156.

⁸ Dassler's Rev. 1885, ch. 37, § 31.

The surviving partner can do nothing in the way of carrying on the partnership affairs except such things as may be necessary to preserve the property; nor can he proceed to wind up its affairs until

he has given the statutory bond. The management of the partnership estate by the surviving partner must be under the control of the probate court: Ballinger v. Redhead, 1 Kans. App. 434. The only manner of settlement of the partnership estate is that prescribed by the statute: Towler v. Bull, 3 Kans. App. 626. The sureties on the bond of the surviving partner cannot be held liable upon transactions not included within the partnership, nor upon the individual liabilities of its members; Carter v. Christie, 57 Kans. 492, 498.

⁹ Glass Company v. Ludlum, 8 Kans. 40, 46, *et seq.*

partnership bond, although there was no allowance of the claim in the probate court, nor a settlement of the partnership affairs; and that no citation is necessary to give validity to the bond, if the surviving partner appears without citation and refuses to comply with the statute.¹ But if he does not so appear, or in some other way declines to take charge of the partnership property so as to waive the statutory citation, he is not divested of his right to control and dispose of the property;² and a proceeding against him by the administrator of the deceased partner should, under such circumstances, be dismissed on motion in the district court.³ Before an account between a survivor and the representatives of his deceased partner can be adjudicated, the account between such survivor and the partnership estate must first be determined; and in a controversy between the representatives of the deceased partner and the survivor, who has given the statutory bond in the probate court, the district court has jurisdiction to determine such account between the survivor and the firm.⁴

In Washington.

In Washington it is held that the statute of 1862 was in aid of the common-law method of closing up partnership estates, and does not interfere with the common-law rights of the surviving partner, except to give the representative of the deceased the right to either have another person than the surviving partner close up the affairs of the firm, or have the latter give security to that end.⁵

In Illinois. In Illinois the surviving partner is required to make a full inventory of the partnership estate, and have the same appraised, and return the inventory and appraisal, together with a statement of the liabilities of the firm, to the probate court; to settle without delay, and account to the executor or administrator of the deceased partner; and may be compelled upon application of such executor or administrator to render account in the probate or circuit court. Upon proper application, the surviving partner may be compelled to give security for faithful settlement, etc., and for refusing to give such security, a receiver may be appointed, with like powers and duties as receivers in courts of chancery. It is held that some of the * provisions of [* 296] this act afford cumulative remedies, but that it does not change the nature of the relation existing between surviving partners and the representatives of the deceased partners in equity.⁶

In Indiana.

A similar law exists in Indiana, the enactment of which was held not to affect the rights of a surviving partner, who had charge of an estate under the law in force prior thereto.⁷

¹ Carr v. Catlin, 13 Kans. 393, 403, *et seq.*

² Blaker v. Sands, 29 Kans. 551.

³ Teney v. Laing, 47 Kans. 297.

⁴ Anderson v. Beebe, 22 Kans. 768, 771.

⁵ Dyer v. Morse, 10 Wash. 492. The court disapproves the Maine cases.

⁶ Nelson v. Hayner, 66 Ill. 487, 492.

⁷ Adams v. Marsteller, 70 Ind. 381.

In Ohio, the surviving partner must apply to the probate court for the appointment of three appraisers, upon notice to the administrator of the deceased partner, who must make out a full inventory of the partnership estate and liabilities; and

In Ohio.

such survivor may, with the consent of such administrator and the approval of the probate court, take the estate at its appraisal, securing the payment of the excess remaining after deducting the liabilities, and giving bond for the payment of the partnership debts.¹

So in California, the interest of the deceased partner must be included in the inventory, and appraised as other property; the surviving partner must settle the affairs of the partnership, and account with the executor or administrator;

In California.

and upon application of the latter the court may order the surviving partner to render an account, and compel it, in case of neglect or refusal, by attachment.² If the surviving partner admit the existence of the partnership, the court may compel him to testify in relation to such account;³ but the probate court can neither adjudicate upon the question of partnership, if raised,⁴ nor decree a balance on the account.⁵

In Alabama, where the surviving partner becomes also co-administrator with another of the deceased partner, the probate court has no jurisdiction over the settlement of the firm

In Alabama.

account with the estate of the deceased partner;⁶ nor has the [* 297] probate court power to order the sale of a deceased partner's interest in partnership lands, before the firm debts have been paid and the accounts between the partners settled and adjusted.⁷

In Arkansas it is decided that the probate court has no jurisdiction to adjust accounts between a decedent and his surviving partner.⁸

In Arkansas.

That the jurisdiction conferred on the probate court by these statutes is exclusive, carrying with it such incidental equitable powers as may be necessary, appears later.⁹

Jurisdiction exclusive.

§ 129. **History of the Missouri Statute giving Jurisdiction to Probate Courts over Partnership Estates.**—The statute of Missouri on this subject is very full, and gives greater powers over surviving

¹ *Rammelsberg v. Mitchell*, 29 Oh. St. 22, 49. It is held in this case, that the law applies where the surviving partner is also one of the executors; that an appraisal is valid, although made upon the basis of a previous appraisal made at the request of the executors, and by the same persons; and that real estate belonging to the partnership may be transferred to the survivor under this statute: p. 53.

² Code Civil Proc., § 1585.

³ *Andrade v. Superior Court*, 75 Cal. 459.

⁴ *Andrade v. Superior Court*, *supra*.

⁵ *Theller v. Such*, 57 Cal. 447, 459.

⁶ *Vincent v. Martin*, 79 Ala. 540.

⁷ *Roulston v. Washington*, 79 Ala. 529.

⁸ *Choate v. O'Neal*, 57 Ark. 299.

⁹ *Post*, § 130.

partners to the probate court than is given to it in any other State. Its history furnishes a striking instance of the increasing confidence in the efficiency of probate courts, and of the tendency of legislation in the American States to enlarge the scope of their powers and jurisdiction. The first legislative enactment subjecting surviving partners to the jurisdiction of probate courts is met with in the Revised Statutes of 1845, incorporating therein the substance of the Maine statute, with change of phraseology only.¹ In 1849 the probate court was authorized to order a surviving partner, upon petition of two-thirds in interest of the creditors, and proof that injustice would not be done to other parties, to adjust, close, and settle the business of the firm without such bond or security; but it was specially enacted that such surviving partner shall in other respects be subject to the control and superintendence of the court.² In the Revised Statutes of 1855, the right to give the bond, and to administer the partnership effects, is limited to surviving partners residing in the State, and such administration is directed to be had in the county in which the partnership business was conducted.³ Authority is also given to the surviving partner to pay partnership debts, without requiring them to be exhibited for allowance in the probate court; but where the administrator of the deceased partner administers the partnership estate, and also where the surviving partner refuses to pay demands against the partnership, provision is made for the allowance and classification of such demands.⁴ Provision is made * for the appearance of surviving partners, [* 298] when a claim is presented against the partnership estate administered by the administrator of the deceased partner, and authority given them to defend against such claim, and appeal from the decision of the probate court.⁵ It is also provided, that the administration of the partnership effects shall in all things conform to administrations in ordinary cases, and that the person administering, and his sureties, shall perform the same duties, be governed by the same limitations and restrictions, and be subject to

¹ Rev. St. 1845. The commissioners directing and superintending their publication say: "There were some important modifications and several new provisions introduced into the general code. . . . The changes in the administration laws relative to partnership effects . . . supply a deficiency in that law which has long been felt": Pref., viii. The revisers content themselves with the remark, "Sections 49 to 56, both inclusive" (containing the provisions referred to in the text), "are new," p. 61, note.

² Laws of Mo. 1849, p. 10. In the next following revision of the laws this

provision is omitted, and the power to permit the surviving partner to administer without bond thus withdrawn.

³ Rev. St. 1855, p. 121, § 51.

⁴ *Ib.*, p. 124, §§ 62, 63. A surviving partner need not exhibit even his own claim against the partnership: Kahn's Estate, 18 Mo. App. 426.

⁵ *Ib.*, § 64. Previous to this revision a surviving partner could not appeal from the judgment of a probate court allowing a demand against the deceased partner's administrator: *Asbury v. McIntosh*, 20 Mo. 278.

the same penalties, as other administrators and their sureties.¹ The General Statutes of 1865 introduced no change; but in the Revised Statutes of 1879 the language subjecting surviving partners to the jurisdiction of the probate court is made peremptory and comprehensive: "The administration upon partnership effects, whether by the surviving partner, or executor or administrator of the deceased partner, shall in all respects conform to administrations in ordinary cases, except as herein otherwise provided, and the person administering upon partnership effects, and his sureties on his official bond, shall perform the same functions and duties, be governed by the same limitations, restrictions, and provisions, and be subject to the same penalties, liabilities, and actions, as other administrators and their sureties."²

In 1883 the legislature introduced a further provision requiring the surviving partner administering to pay partnership debts *pro rata*, according to their respective classes, securing to all the creditors an equal participation in the assets of insolvent partnerships.³

[* 299] * The history of this statute, together with the interpretations it received from the judiciary in the various phases of its development, strikingly illustrates, also, the difficulty attending the introduction of principles which require, on the part of judges and lawyers, a departure from the familiar, well-trodden paths of the common law. "The provision requiring the surviving partner to give bond is a new one," says Scott, J.,⁴ "in derogation of the rights of the surviving partner as they existed at common law. All interference with his rights must have a support in the statute law, and we are restrained from going further in diminishing his control over his goods than the words of the law fairly warrant. . . . There is nothing here" (reciting the statute) "like a power of removal. . . . It would be against all principle to assume by implication a power of taking away the right of control which a man has over his own property." This language was used in the

¹ Rev. St. 1855, § 65.

² Rev. St. 1879, § 68.

³ Laws of Mo. 1883, p. 22. This provision brings the administration of partnership estates into harmony with that of the estates of individuals with respect to the payment of debts: it destroys the power of surviving partners to prefer creditors, to the deprivation of creditors not preferred, where the assets are insufficient to pay the debts in full. Such was held to be in the power of a surviving partner at common law, and the provisions of the statute requiring classification of demands, and their payment in the same

manner as in ordinary cases of administration, were, previous to this amendment, held insufficient to deprive him of such power: *Collier v. Cairns*, 6 Mo. App. 188. Where there is an administering surviving partner, and no refusal by him to pay a claim against the partnership estate, its allowance and classification by the probate court is unauthorized, and gives such demandant no priority over other creditors who present their claim to the survivor: *Easton v. Courtwright*, 84 Mo. 27.

⁴ *Green v. Virden*, 22 Mo. 506, 511.

decision of a case arising under the law of 1845, the Supreme Court denying the power of the probate court under said law to remove a surviving partner, and deprive him of the administration of the partnership estate, on the ground of non-residence. In the revision of the statutes which took effect in 1856, the same year in which this decision was rendered, the residence within the State of the surviving partner was made a condition to his right to give the bond, and the section added which placed the surviving partner under the same control of the probate court which it possessed over administrators.¹

Notwithstanding these provisions, and the further provision requiring claims of partnership creditors which the surviving partner "shall refuse to pay" to be exhibited to the probate court "for allowance and classification," giving the court "the same jurisdiction of demands thus presented as it has of demands against estates in ordinary cases," the Supreme Court held that "under this act the powers of a surviving partner in closing up the affairs of the partnership are not changed or restricted, otherwise than as he is required to give bond and security that he will use due diligence and fidelity; . . . for any misconduct or neglect there is a remedy on his bond."² The same view was announced * by [* 300] the Court of Appeals;³ but the latter court also held, that the remedy by *scire facias*, given by the statute against the sureties of an administrator, may be resorted to by the administrator of a deceased partner against the sureties of a surviving partner who fails to obey an order of the probate court directing him to pay over the amount found due by him on final settlement.⁴ And recently the Supreme Court, with three judges dissenting, held that the jurisdiction of the probate court over the partnership, operated to cut off the right of the surviving partner to make a general assignment for the benefit of creditors.⁵ It is also held, that where a surviving partner having given bond to administer refuses to pay the demand of a partnership creditor, the creditor has no action on the surviving partner's bond, unless he present his claim to the probate court for allowance and classification.⁶

We have seen that upon these decisions the legislature, in 1879,

¹ *Supra*, pp. * 297, * 298.

² *Crow v. Weidner*, 36 Mo. 412, 416. In the case of *State v. Woods*, 36 Mo. 73, 80, it was held that a partnership creditor, who failed to cause his claim to be classified in the probate court, has no cause of action on the partnership bond; but in *Denny v. Turner*, 2 Mo. App. 52, the promise of the surviving partner to pay a demand was held sufficient to defeat the statutory limitation, so as to enable the

creditor to obtain the allowance against the administrator of the deceased partner, if presented within the two years after the removal of the surviving partner.

³ *Denny v. Turner*, *supra*; *Collier v. Cairns*, 6 Mo. App. 188, 191.

⁴ *McCartney v. Garneau*, 4 Mo. App. 566, 567.

⁵ *State v. Withrow*, 141 Mo. 69, 84.

⁶ *State v. Shacklett*, 73 Mo. App. 265.

directed the winding up of a partnership estate by the surviving partner to conform, *in all respects*, to the law of administration, so far as applicable, and in 1883, to meet the cases of *Denny v. Turner*, *Collier v. Cairns*, and *Crow v. Weidner*, expressly required the payment of partnership debts *pro rata* according to their class.¹ But even the peremptory terms of the statute of 1879 are inadequate to extinguish the difference between the winding up of a partnership by the surviving partner, and the administration of an estate by the executor or administrator of a decedent. The Supreme Court has recently decided that the probate court has no power to authorize the surviving partner to sell partnership real estate for the payment of partnership debts.²

In the Revision of 1889, the division of claims against partnership estates into two classes, according as they are presented for allowance within the first or second year, is repealed, and creditors are now required to present their claims for allowance within the first year of the administration, or be forever barred against the partnership effects under administration.³ From this it would seem that the legislature intended to enable final settlement of partnership estates to be made at the end of the first year, because all claims are then barred. But since creditors may proceed, at their option, against the private estate of the deceased partner, or against the survivor, for the enforcement of their claims against a partnership, as well as against the partnership estate; and since all such claims, when allowed against and paid by the administrator of the deceased partner, are by the statute made charges against the partnership effects, to be allowed and included in the final settlement of the partnership estate,⁴ it is doubtful whether the legislature contemplated such final settlement before the expiration of the two years within which partnership creditors are allowed to enforce their demands against the estate of the deceased partner. There is no doubt, however, that such a settlement would be collaterally unassailable (if otherwise valid) and could not be impeached as having been prematurely made. It has not been judicially determined, whether final settlement of partnership administration can be compelled before the end of the second year.⁵

¹ *Supra*, p. *298.

² *Easton v. Courtwright*, 84 Mo. 27, 39, holding that such a partner may sell the realty to pay firm debts, without a license from the probate court.

³ Rev. St. 1889, § 65.

⁴ Rev. St. 1889, § 65.

⁵ The bond is required to be conditioned, *inter alia*, to "pay over, within two years, unless a longer time be allowed by the court, to the executor or administra-

tor, the excess," &c. : Rev. St. 1889, § 59. It is to be observed, however, that the same condition as to time (two years) was contained in the bond (Rev. St. 1855, p. 122, § 55) at a time when creditors were allowed three years to prove debts against the private estate (Rev. St. 1855, p. 151, § 1), but only two years to prove debts against the partnership estate (St. 1855, p. 125, § 63).

§ 130. **Effect of Giving or Refusing to Give Bond.**—The jurisdiction conferred upon probate courts over the estates of partnerships dissolved by death is exclusive, and carries with it such equitable powers as may be necessary to wind up the partnership affairs. Until final settlement of such estate in the probate court, the circuit court or court possessing original chancery powers has no jurisdiction over it.¹ The final settlement has the force and effect of a judgment, from which appeal may be taken.²

In Maine, as already shown,³ the surviving partner has no power over the partnership effects, after the death of a copartner, until he has given the statutory bond;⁴ but in Missouri he is not

* divested of his common-law powers to wind [* 301] up the partnership until the administrator of the deceased partner has given the bond authorizing him to take charge of the partnership effects on the survivor's refusal to do so.⁵ In Kansas the law is similar to that prevailing in Missouri.⁶ This doctrine involves the power of the surviving partner to fully settle up the partnership affairs and transfer the firm property in payment of its debts without giving the bond required by the statute, unless the administrator of the deceased partner give the bond, which he cannot do until the expiration of at least thirty days from the partner's death. It also results from these cases that until the administrator of the deceased partner does so qualify, the right of the surviving partner cannot be questioned, most

¹ *Ensworth v. Curd*, 68 Mo. 282; *Caldwell v. Hawkins*, 73 Mo. 450. It is held in Missouri that the statute affords an ample remedy to the administrator of the deceased partner in the probate court for an accounting and settlement of the partnership estate, and while the court does not wish to be understood as holding this statutory mode exclusive in all cases, yet cogent reasons should be shown why it should not be so held before the administrator of the individual estate should be permitted to proceed in equity to compel an accounting and settlement of the partnership: *Goodson v. Goodson*, 140 Mo. 206, 216.

² *McCartney v. Garneau*, 4 Mo. App. 566.

³ *Ante*, § 128.

⁴ *Cook v. Lewis*, 36 Me. 340.

⁵ *Weise v. Moore*, 22 Mo. App. 530, 534; *Bredow v. Mutual Savings Institution*, 28 Mo. 181, 184, recognized in *Mutual Savings Institution v. Enslin*, 37 Mo. 453, 457; *Holman v. Nance*, 84 Mo.

674, 678; *Easton v. Courtwright*, 84 Mo. 27, 38; *Goodson v. Goodson*, 140 Mo. 206; *Hargadine v. Gibbons*, 45 Mo. App. 460 (criticising *Mutual Savings Institution v. Enslin*, *supra*, as in conflict with prior and subsequent Missouri cases and transferred to the Supreme Court, as being, in the opinion of one of the judges of the Court of Appeals, in conflict with that decision). When the surviving partner has refused to give bond, and the administrator of the deceased partner has given the bond as provided by law, the effect is to substitute the latter to all the rights and duties which would have been enjoyed by a surviving partner at common law, and becomes the legal representative of the co-partnership for purposes of suit on its choses in action: *Latimer v. Newman*, 69 Mo. App. 76, 81.

⁶ *Teney v. Laing*, 47 Kans. 297, 303. So also under the 1862 statute of Washington: *Dyer v. Morse*, 10 Wash. 492, disapproving the Maine decisions.

clearly not by a partnership debtor¹—and that no one can be authorized to take charge of the partnership estate, save the surviving partner or the administrator of the deceased partner.² Hence, if the estate of the deceased partner is in charge of the public administrator, it may become the duty of the probate court to order the public administrator to take charge of and wind up the partnership estate in his official capacity, if the surviving partner refuse to give the bond.³

Although the statute provide for citation against the surviving partner, such citation is not essential to the validity of the bond to be given by the administrator of the deceased partner; notice to him that he will apply to the probate court for an order directing him to take charge of the partnership estate unless the survivor give bond, is sufficient.⁴

Notice to the survivor by the administrator of deceased partner.

The inventory which the administrator of a deceased partner is required to make before it is determined whether he or the surviving partner shall administer the partnership estate, includes the partnership effects for the purpose only of ascertaining the interest of the deceased partner; it does not authorize such administrator to take charge of or exercise any control over the same. Hence the sureties on his bond are not liable for conversion of the partnership effects so inventoried, made after giving the additional bond required to authorize him to take charge of the partnership effects.⁵

Liabilities of sureties under respective bonds.

It is held in Missouri, that neither a surviving partner nor his administratrix is chargeable with the duty of accounting in the State courts for partnership assets which are outside the State until such time as the proceeds thereof actually come into their hands within the State.⁶

¹ Hargadine v. Gibbons, 114 Mo. 561, 566.

² Weise v. Moore, 22 Mo. App. 530.

³ Headlee v. Cloud, 51 Mo. 301.

⁴ James v. Dixon, 21 Mo. 538; Carr v. Catlin, 13 Kans. 393.

⁵ Orrick v. Vahey, 49 Mo. 428, 430; Carr v. Catlin, 13 Kans. 393; Glass Company v. Ludlum, 8 Kans. 40.

⁶ Scudder v. Ames, 142 Mo. 187.

* CHAPTER XIII.

[* 302]

ESCHEATS.

§ 131. **Devolution of Property in Default of Heirs.**—Property of deceased persons necessarily vests in the State if no one is competent to take it as heir or testamentary donee.¹ “It seems to be the universal rule of civilized society, that when the deceased owner has left no heirs it should vest in the public and be at the disposal of the government.”² Such property is said to *escheat*, — a term applied in the common law to the reversion of an estate to the lord from whom it was held, either *propter defectum sanguinis*, i. e. on account of the failure of heirs of the grantee, or *propter delictum tenentis*, i. e. on account of the felony or attainder of the tenant.³ Of course, there can be no escheat in this country on the latter ground (nor in England, since corruption of the blood and forfeitures and escheats are done away with by statute⁴); hence, in the United States, escheat signifies a reversion of property to the State in consequence of a want of any individual competent to inherit.⁵

§ 132. **Escheat at Common Law.**—It will be remembered that at common law the term “escheat” is properly applicable to real estate only, since it is an incident to the feudal tenure,⁶ although Blackstone, in one part of his Commentaries, treats the doctrine of escheats as applying to property

¹ “It is right and proper, that when the owner of property dies without giving it away, and without leaving any object having natural claims to his bounty, such as heirs or next of kin, his property should go to the community of which he is a member”: *per* Tucker, P., in *Hubbard v. Goodwin*, 3 Leigh, 492, 518; *Matthews v. Ward*, 10 Gill & J. 443, 450.

² *Bouvier*, Law Dict. “Escheat,” citing *Domat*, Droit Pub., liv. 1, t. 6, s. 3, n. 1; 4 Kent, 424; 2 Bla. Comm. 244; 1 Washb. R. Prop. 24, 27; 1 Browne, Civ. L. 250.

³ *Abbott*, Law Dict. “Escheat.”

⁴ 33 & 34 Vict. c. 23.

⁵ Within the States of the American Union, escheats for defect of heirs are to the State in which the property is situate, and not to the United States: *Cooley's Blackst.*, vol. 1, bk. 2, p. 302, note 9. “In this country,” says Gray, J., in *Hamilton v. Brown*, 161 U. S. 256, 263, “where the title to land fails for want of heirs and devisees, it escheats to the State as part of its common ownership, either by operation of law, or upon the inquest of office, according to the law of the particular State.”

⁶ 2 Bla. Comm. 72, 89, 244.

in general.¹ The title by escheat accruing to the lord [* 303] *upon the termination of his vassal's tenancy (by death without heirs or corruption of the tenant's blood) was not complete until the lord performed an act of his own by *entering* on the lands and tenements so escheated, or suing out a *writ of escheat*, on failure of which, or by doing any act amounting to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps the possession, his title by escheat was barred.² It is accordingly said, that at common law a process like a recovery of the lands by suit must be gone through with before the land can properly be considered as belonging to the State.³ But the necessity of an "inquest of office," or "office found," as the proceeding to ascertain the sovereign's title is called, seems to apply to cases only in which the escheat is claimed on the ground that the heir is an alien. Story, J., states the common law to be,⁴ that an alien can take lands by purchase, though not by descent; he cannot take by the act of law, but he may by the act of the party. There is no distinction whether the purchase be by grant or devise. The estate vests in the alien, not for his own benefit, but for the benefit of the State; the alien has the capacity to *take*, but not to *hold* lands; they may be seized into the hands of the sovereign. Until the lands are so seized, the alien has complete dominion over them, and may convey them to a purchaser. The title acquired by an alien by purchase is not divested *until office found*, because, as the freehold is in the alien, and he is tenant to the lord of whom the lands are holden, it cannot be divested out of him but by some notorious act, by which it may appear that the freehold is in another. And the reason of the difference why, when an alien dies, the sovereign is seised without office found is because otherwise the freehold would be in abeyance, as an alien cannot have any inheritable blood. Even after office found, the king is not adjudged in possession, unless the possession were then vacant; for if the possession were then in another, the

Title by escheat must be perfected by some notorious act.

When inquest of office is necessary.

Alien holds lands coming to him by purchase subject to be divested on office found.

On death of alien property escheats without inquest.

¹ "In case no testament be permitted by the law, or none be made, and no heir be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country": 2 Bla. Comm. 11.

² 2 Bla. Comm. 245.

³ 3 Washb. on R. Prop. *444. "By the civil law as well as the common law, the King cannot take upon himself the possession of an estate, said to have es-

cheated, until the fact is judicially ascertained by a proceeding in the nature of an inquest of office": *People v. Folsom*, 5 Cal. 373, 378. "The King's title was not complete without an actual entry upon the land, or judicial proceeding to ascertain the want of heirs and devisees": *Gray, J.*, in *Hamilton v. Brown*, 161 U. S. 256, 263, stating the common-law method of escheat.

⁴ *Fairfax v. Hunter*, 7 Cr. 603, 619.

king must enter or seise * by his officer, before the possession *in deed* shall be adjudged to him. [* 304]

It seems to follow that "whenever the owner dies intestate, without leaving any inheritable blood, or if the relations whom he leaves are aliens, there is a failure of competent heirs, and the lands vest immediately in the State by operation of law. No inquest of office is requisite in such cases."¹ But there will be no escheat so long as there are any heirs capable of inheriting; if some of the next of kin be incapable by reason of alienage to take, the inheritance descends to those who are competent, as if such alien had never existed.²

The distinction between *escheat* (to the chief lord of the fee) and *forfeiture* (to the crown) must not be overlooked. The one was a consequence of the feudal connection, the other was anterior to it, and inflicted upon a principle of public policy.³ It follows from the nature of escheats at common law, that trust property does not escheat upon the death of the *cestui que trust*, because, the legal title being in the trustee, there is no lack of an owner, although the owner of the beneficiary title die without heirs.⁴ Personal property, which in default of next of kin goes to the king, as *parens patriæ*, is allodial by law; and for this reason, when held in trust, the king is as well entitled to it as to any other personal estate.⁵

§ 133. **Escheats under the Statutes of the Several States.** — It results from what has already been stated, that escheat in the feudal sense has never existed in America, at least not since the Revolution,⁶ but has here become a falling of the estate into the general property of the State, either because the tenant is an alien, or because he has died intestate without lawful heirs to take his estate by succession.⁷ This principle includes personal property as well as real, and is so treated in the statutes governing the subject in the several States, some of them distinguishing between the two species of property in the method pointed out for its recovery by the State, and as to the time allowed claimants to

¹ 4 Kent, * 424; Farrar v. Dean, 24 Mo. 16; People v. Conklin, 2 Hill (N. Y.), 67, 74; Pom. Mun. L. 567. See post, § 133, on the necessity of inquest under the statutes.

² Wunderle v. Wunderle, 144 Ill. 40, 67; Schultze v. Schultze, 144 Ill. 290, 298.

³ 4 Kent, * 427.

⁴ Burgess v. Wheate, 1 Wm. Bl. 123; 1 Eden, 177; 2 Washb. R. Prop. * 185.

⁵ Burgess v. Wheate, 1 Wm. Bl. 123, 164.

⁶ Mr. Washburn calls attention to the existence of escheat, in the feudal sense, in Maryland, and perhaps a few other of the Colonies, before the Revolution: 3 Washb. R. Prop. * 443. A full account of the grant of lands to Lord Baltimore may be found in the cases of Fairfax v. Hunter, 7 Cr. 603, and Ringgold v. Mallott, 1 Har. & J. 299.

⁷ 3 Washb. * 443; 4 Kent, * 424.

[* 305] * prove their right to property declared escheated; but in all of them (except where the statute is silent on this point, as in Colorado¹), the right of the State to property left without a competent heir or testamentary donee is placed upon the same ground, whether it is real or personal. In Maryland, personal property escheats if there be no heirs within the fifth degree of consanguinity.²

In Maryland personal property escheats unless the heirs be within fifth degree.

The American doctrine also includes property held in trust, whether by express enactment of the statute, as, for instance, in Kentucky,³ Pennsylvania,⁴ Virginia,⁵ and West Virginia,⁶ or as a necessary consequence of the right of the State as *ultimus hæres*; ⁷ *a fortiori* if the trust be a contrivance to defeat the law, as where an alien purchases real estate in the name of a trustee to evade the law prohibiting aliens from holding real estate.⁸

Property held in trust.

It has also been held, that an estate in remainder, if vested in fee, may escheat before the termination of the life estate; as where a testator devised the remainder to one who is incompetent to take it, and dies without heirs. In such case, the interest devised goes to the State by escheat;⁹ but in Pennsylvania it is held that the remainder cannot be escheated until the termination of the life estate.¹⁰ This subject is again mentioned in connection with the subject of the title of the State.¹¹

Escheat of remainders.

We have seen that at common law no inquest of office is necessary to vest the title by escheat in the king,¹² unless the escheat is claimed because the heir is an alien.¹³ The same doctrine holds good in the United States, except where such proceeding is directed by express statute.¹⁴ With

Inquest not necessary unless required by statute.

¹ The Constitution directs that the school fund shall consist, i. a., of property escheated to the State: Const. (Gen. St. 1883), art. ix. § 5.

² Pub. Gen. L. 1888, p. 1358, § 135.

³ St. 1894, § 1617.

⁴ But the Pennsylvania statute (of 1869) was held impossible of execution as to trust estates: West's Appeal, 64 Pa. St. 186, 194. See, however, Commonwealth v. Naile, 88 Pa. St. 429, 434, in which the escheat of property held by a trustee was held good.

⁵ Code, 1887, § 2396.

⁶ Code, 1891, p. 631, § 24.

⁷ Matthews v. Ward, 10 G. & J. 443, 451, *et seq.*; Commonwealth v. Naile, *supra*.

⁸ Hubbard v. Goodwin, 3 Leigh, 492, 514.

⁹ People v. Conklin, 2 Hill (N. Y.), 67, 74.

¹⁰ Commonwealth v. Naile, *supra*.

¹¹ Post, § 134.

¹² Ante, § 132.

¹³ Maynard v. Maynard, 36 Hun, 227, 231.

¹⁴ Crane v. Reeder, 21 Mich. 24, 78, *et seq.* (citing Mooers v. White, 6 John. Ch. 360; Slater v. Nason, 15 Pick. 345, 349; Montgomery v. Dorion, 7 N. H. 475; Rubbeck v. Gardner, 7 Watts, 455; O'Hanlin v. Den, 20 N. J. L. 31; s. c. 21 N. J. L. 582); Sands v. Lynham, 27 Gratt. 291, 296; Reid v. State, 74 Ind. 252. Where the statute requires proceedings in the nature of an inquest of office, the record thereof is the only evidence by which a title by escheat can be established: Wallahan v. Ingersoll, 117 Ill. 123. When a man dies, the legislature is under no constitutional obligation to leave the title to his property, real or personal, in abeyance

* respect to real estate this is in many States required. [* 306]
The statutes of Arkansas,¹ Illinois,² Maine,³ Mississippi,⁴

Missouri,⁵ South Carolina,⁶ Virginia,⁷ West Virginia,
and probably some other States, distinguish between
personal property. real and personal property in this respect; so, by the
present Code in California;⁸ but in Delaware,⁹ Georgia,¹⁰ Oregon,¹¹
and Pennsylvania,¹² there must be proceedings in the nature of
an inquest for personal as well as for real property. In
respect of personal property the law in most States
makes it the duty of the probate court in which admin-
istration is pending to adjudge the question of escheat, either as
constituting an element of the order of distribution, since the State
is but the *ultimus heres* in such cases, or by express direction of
the statute, as in Alabama,¹³ Arkansas,¹⁴ Georgia,¹⁵ Illinois,¹⁶

Indiana,¹⁷ Iowa,¹⁸ Missouri,¹⁹ and Vermont.²⁰ The
action or proceeding by the State to recover escheated
property from a person in possession is distinct from
and must not be confounded with the inquest of office; in such
action the State is in the same position as any individual suing for
his right, and in ejectment must recover upon the strength of its
own title, the bare possession of the defendant being sufficient to
defeat the State unless full proof be made of all the elements
constituting * the escheat.²¹ So the State may, like an indi- [* 307]

for an indefinite period; but it may pro-
vide for promptly ascertaining, by appro-
priate judicial proceedings, who has suc-
ceeded to his estate. If such proceedings
are had, after actual notice to all known
claimants, and constructive notice to all
possible unknown claimants, the final de-
termination of the right of succession,
either among private persons, as in the
ordinary administration of estates, or be-
tween all persons and the State, as by
inquest of office or similar process to de-
termine whether the estate has escheated,
is due process of law; and a statute pro-
viding for such proceeding and determi-
nation does not impair the obligation of
any contract contained in the grant under
which the former owner held, whether
that grant was from the State or from a
private person: Gray, J., in *Hamilton v.*
Brown, 161 U. S. 256, 275.

¹ Dig. of St. 1894, § 2851.

² St. & C. Ann. St. (2d ed., 1896), ch.
49, § 3.

³ Rev. St. 1883, ch. 93, § 11.

⁴ Ann. Code, 1892, §§ 1702 *et seq.*

⁵ Rev. St. 1889, §§ 4808 *et seq.*

⁶ Rev. St. 1893, § 2438; *Muir v. Thom-*
son, 28 S. C. 499.

⁷ Code, 1887, § 2375.

⁸ Code Civ. Pr. § 1269; *People v.*
Roach, 76 Cal. 294.

⁹ Laws, 1874, p. 495.

¹⁰ Code, 1895, § 3577.

¹¹ Code, 1887, § 3136.

¹² *Pepper & L. Dig.* 1896, p. 1858, §§ 6, 9.

¹³ Code, 1896, §§ 1752, 1755.

¹⁴ *Dig. of St.* 1894, §§ 2844 *et seq.*

¹⁵ Code, 1895, § 3577.

¹⁶ St. & C. Ann. St. 1896, §§ 2 *et seq.*

¹⁷ *Fuhrer v. State*, 55 Ind. 150, 152.

¹⁸ Code, 1897, § 3388.

¹⁹ Rev. St. 1889, § 4800.

²⁰ St. 1894, § 2549.

²¹ 3 Washb. R. Prop. * 445; *Common-*
wealth v. Hite, 6 Leigh, 588; *Catham v.*
State, 2 Head, 553; *Hammond v. Inloes*,
4 Md. 138; *Ramsey's Appeal*, 2 Watts,
228, 231; *Commonwealth v. Selden*, 5
Munf. 160; *State v. Meyer*, 63 Ind. 33,
38. But it is held in Louisiana that
where the State claims the succession,
in a proceeding against the universal leg-
atee, who is in possession of the estate,

vidual, be estopped by its own grant and warranty from claiming escheat.¹

In most of the States it is made the duty of some officer, specially vested with authority for such purpose, to investigate and ascertain whether property, real or personal, have escheated, and to take all needful steps in securing such to the State. Escheator.

In Delaware,² Kentucky,³ Virginia,⁴ and West Virginia, this officer is appointed by the governor, and is called Escheator; in Pennsylvania⁵ the auditor-general, and in South Carolina⁶ the Escheators
ex officio. county auditor, is made by statute *ex officio* escheator;

and in Alabama,⁷ Georgia,⁸ and Iowa,⁹ the administrator of an estate to which there are no competent heirs is charged with the duties of an escheator. In most States the duty to recover escheated property for the State is imposed upon the attorney-general,¹⁰ prosecuting attorney,¹¹ State's attorney,¹² district attorney,¹³ or directly upon the representative officers of the school boards to be benefited by the proceeding;¹⁴ because, with rare exceptions, the proceeds of escheated property are dedicated in the several States to the general school fund, or otherwise appropriated for the purposes of public instruction.¹⁵ It is held, that the beneficiaries of these donations acquire a vested right to the property escheated, as soon as the facts Beneficiaries
under law of
escheat entit-
led to notice
before sale of
property for
debts. which give rise to the escheat exist; hence a law

[* 308] changing the destination * of escheats can operate prospectively only;¹⁶ and an order to sell the land of one who died without leaving heirs, for the payment of his debts, is void, unless the parties entitled to escheated lands are present, or have notice of

on the ground of his alleged incapacity, in which proceeding third parties intervened claiming as heirs at law, the burden is not on the State to prove that the deceased had left no heirs, but on the intervenors to prove their heirship: Succession of Townsend, 40 La. An. 66.

¹ Commonwealth v. André, 3 Pick. 224.

² Laws, 1874, p. 495, § 2.

³ Gen. St. 1887, p. 540. By the St. 1894, the escheator is appointed by the Auditor: § 1610.

⁴ Code, 1887, § 237.

⁵ Pep. & L. Dig. 1896, p. 1858, § 6.

⁶ Rev. St. 1893, § 2435.

⁷ Code, 1896, § 1753.

⁸ Code, 1895, § 3577. But the administrator will be restrained in equity from recovering possession of a tract of land left by one who died intestate, without heirs, distributees, or creditors, from one

who purchased the same and has been many years in possession: Smith v. Gen-try, 16 Ga. 31.

⁹ Code, 1897, § 3389.

¹⁰ In California, Maine, Massachusetts, Minnesota, New Jersey, New York.

¹¹ In Arkansas, Indiana, Missouri, Ohio.

¹² In Illinois.

¹³ In Mississippi, Tennessee, Texas.

¹⁴ In Kansas, North Carolina (see Oliveira v. University, Phill. Eq. 69).

¹⁵ In many States this is provided by the constitution, and gives rise to doubts concerning the power of the legislature or of courts to dispose of escheats.

¹⁶ Rock Hill College v. Jones, 47 Md. 1, 18, *et seq.*; University of North Carolina v. Foy, 1 Murphy, 58, 81, *et seq.*, Hall, J., dissenting, on the ground that the University is but the agent of the State, p. 89.

the application for such order.¹ So, where the constitution provides who shall be the recipient of escheated property, the same cannot be diverted, either by administration or by act of the legislature.² The law in force at the time of the death of one who leaves only alien heirs determines the question of escheat; and a treaty securing to aliens competent to inherit real estate the right to such inheritance, confers no right upon an alien who was, at the time of the intestate's death, incompetent, though subsequently aliens were by statute enabled to hold real estate by inheritance.³

§ 134. **Nature of the Title by which the State holds Escheats.**

—Chancellor Kent, in his Commentaries, mentions with disapprobation “a very inequitable rule of the common law, that if the king took lands by escheat, he was not subject to the trusts to which the escheated lands were previously liable;”⁴ and says, that “the opinion in England is understood to be that, upon the escheat of the legal estate, the lord will hold the escheat free from the claims of the *cestui que trust* ;”⁵ and he points out certain English statutes⁶ as calculated to check the operation of so unreasonable a principle. In America the principle is universally recognized, that, where property escheats, the State takes precisely the title which the party dying had, and no other.⁷ It is taken in the condition and to the extent in which he held it. This is the necessary result of the principle that escheat in America means only the substitution of the State to the rights of an owner who is *incom- [* 309] petent to hold the title, or as heir to an estate in case there be no other heir competent to take it.⁸ In some of the States it is provided by statute that trust estates shall not escheat for the want of a trustee,⁹ or that the State holds escheated lands subject to existing trusts.¹⁰ It likewise follows, that an estate in remainder may be escheated during the existence of a valid life

¹ Hinkle v. Shadden, 2 Swan, 46; Parchman v. Charlton, 1 Coldw. 381, 388.

² State v. Reeder, 5 Neb. 203, 205; Harvey v. Harvey, 25 S. C. 283.

³ Hauenstein v. Lynham, 28 Gratt. 62, 67. This case was reversed by the United States Supreme Court, in 100 U. S. 483, on the ground that a former treaty enabled the aliens to take. As to the capacity of aliens to inherit, see *ante*, § 19.

⁴ 4 Kent, *425, citing 3 Harg. Co. Litt. 13, n. 7; Pimble's Case, Moore, 196.

⁵ 4 Kent, *426.

⁶ 40 Geo. III. c. 88; see also 59 Geo. III. c. 94, enabling the king, by warrant

or grant, to execute the trust. The statute of 4 & 5 Wm. IV. c. 23, provided that, when a trustee of lands died without an heir, the court of chancery may appoint a trustee to act for the party beneficially interested.

⁷ 3 Washb. R. P. *446; 4 Kent, *427.

⁸ Casey v. Inloes, 1 Gill, 430, 507; Straub v. Dimm, 27 Pa. St. 36, 39; Parchman v. Charlton, 1 Coldw. 381. But the State is not an heir in the sense of being entitled to notice of the probating of a will, like an heir at law: State v. Ames, 23 La. An. 69.

⁹ As in Virginia and West Virginia.

¹⁰ New York may be instanced.

estate,¹ and that the escheat of the intervening estate does not affect the remainder;² and that an "escheat grant," i. e. a grant by the State of property which it had acquired by escheat to a purchaser, passes the estate just as the original grantee held it, with all privileges and appurtenances, and subject to all liens and encumbrances, existing at the time of the escheat.³

Most of the States make liberal provisions to enable heirs to recover property even after judgment of escheat, if they were not parties to the inquisition, and had no notice of the proceeding. Where money and the proceeds of the sale of personal or real property have been paid into the State treasury, the relief consists in a provision authorizing the payment of the net amount of the escheat to the claimants who within a certain time make sufficient proof of their title. The time is limited to two years for personal property in Mississippi;⁴ to five years for personalty in Delaware,⁵ and for realty in Illinois,⁶ Mississippi,⁷ Missouri,⁸ and South Carolina;⁹ to six years in Georgia;¹⁰ to seven years in Arkansas¹¹ and Delaware;¹² to ten years in Iowa,¹³ North Carolina,¹⁴ Oregon,¹⁵ Virginia,¹⁶ and for personalty in Illinois¹⁷ and Missouri;¹⁸ to seventeen years in Vermont;¹⁹ [* 310] to twenty years in * California;²⁰ to twenty-one years in Kansas;²¹ and to thirty years in Connecticut.²² No time seems to be fixed within which application must be made in Maryland,²³

How heirs may recover their inheritance after escheat.

¹ *People v. Conklin*, 2 Hill (N. Y.), 67. But see *ante*, p. * 305.

² *Borland v. Dean*, 4 Mas. 174, 180.

³ *Casey v. Inloes*, 1 Gill, 430, 507. As land is not escheatable so long as there are competent heirs of the original grantee, the grant by the State of lands before there is a failure of heirs is simply void: *Hall v. Gittings*, 2 Har. & J. 112, 125.

⁴ Ann. Code, 1892, § 1712.

⁵ Laws, 1874, p. 498, § 18.

⁶ St. & Cur. St. 1896, ch. 49, § 7.

⁷ Rev. Code, 1880, § 892. In the Annotated Code of 1892 prepared by Thompson, Dillard, and Campbell, and adopted by the legislature, this provision is changed; the statute now is, that if escheated land be recovered from the purchaser at the suit of an heir, within two years after the escheat was declared, the State will refund to the purchaser the purchase-money with six per centum interest per annum: Ann. Code, 1892, § 1711.

⁸ Rev. St. 1889, § 4823.

⁹ Rev. St. 1893, § 2444.

¹⁰ Code, 1895, § 3580.

¹¹ Dig. of St. 1894, § 2864.

¹² For real estate: L. 1874, p. 498, § 18.

¹³ Code, 1897, § 3391.

¹⁴ Code, 1883, § 1504.

¹⁵ Code, 1887, § 3141.

¹⁶ Code, § 2403. See also Code, 1873, p. 877, § 33.

¹⁷ St. & Curt. St. 1896, p. 1811, ¶ 7.

¹⁸ Rev. St. 1889, § 4821.

¹⁹ St. 1894, § 2552.

²⁰ Code Civ. Proc. § 1272. But this only authorizes such non-resident alien to show that which he might have shown had he been made a party to the escheat proceedings, to wit, that he did appear and claim the property within five years from the time of the succession: *State v. Smith*, 70 Cal. 153, 157.

²¹ Gen. St. 1897, p. 550, § 198.

²² Gen. St. 1888, § 648.

²³ As to personalty: Pub. Gen. L. 1888, art. 93, § 136. But no collateral heirs more distant than children of brothers and sisters can apply.

Michigan,¹ New Hampshire,² Rhode Island,³ and Texas.⁴ It is held in Pennsylvania, that the heirs or kindred of any partner of a partnership whose property has escheated may claim the property taken by the State.⁵ In South Carolina it is held that, where an heir claims compensation for property declared escheated, the fact that the legislature has granted away the right to the land in question, and that no money has been paid into the treasury, does not defeat the claim.⁶ In Texas, if the proceedings to escheat have been regular, the judgment is conclusive evidence of the State's title in the land, not only against claimants having had actual notice, but also against all other persons interested in the estate and having had constructive notice.⁷

The State may, by legislative grant, give title to lands escheated for the want of heirs before office found;⁸ but if the grant be of land to which the State has no title, the statute constituting the grant is void.⁹

§ 135. **Administration of Escheated Estates.** — It is provided in the statutes of some of the States, that where a person dies leaving no competent heirs, there shall nevertheless be administration of his estate in the usual manner. In Alabama,¹⁰ Arkansas,¹¹ Connecticut,¹² Illinois,¹³ Iowa,¹⁴ Kentucky,¹⁵ Missouri,¹⁶ New Hampshire,¹⁷ North Carolina,¹⁸ this is affirmatively required by the language of the enactments. It is obvious that in these States the object of the law is fully accomplished by placing the State in the category * of an [* 311] heir, represented in all matters requiring representation, in court or otherwise, by the official escheator or person designated to guard the interest of the State in such proceeding; and the rights of creditors or other claimants against such estate are adjudicated precisely as if there were no question of escheat. In other States

Administration of personalty as usual.

¹ Howell's St. § 5988.

² Pub. St. 1891, ch. 196, § 8. Application must, however, be made to the legislature.

³ Attorney-General v. Providence, 8 R. I. 8, 10.

⁴ Sayles' Tex. St. 1897, § 1834.

⁵ Commonwealth v. No. Am. Land Co., 57 Pa. St. 102.

⁶ *Ex parte Williams*, 13 Rich. 77, 84.

⁷ *Hamilton v. Brown*, 161 U. S. 256, 268.

⁸ *Colgan v. McKeon*, 24 N. J. L. 566; *McCaughal v. Ryan*, 27 Barb. 376, 378; *Rubeck v. Gardner*, 7 Watts. 455, 458; *Nettles v. Cummings*, 9 Rich. Eq. 440.

⁹ *Colgan v. McKeon*, *supra*.

¹⁰ Code, 1896, § 1753. Creditors of a decedent whose lands have been escheated

cannot subject such lands to the satisfaction of their claims without an order from the ordinary to the administrator, as in other cases: *Congregational Church v. Morris*, 8 Ala. 182, 193. If no one makes application for letters, it is proper, if not imperative, for the probate judge, on the facts being brought to his notice, to grant administration *ex mero motu*: *Nicrosi v. Gingly*, 85 Ala. 365.

¹¹ Dig. of St. 1894, § 2843.

¹² Gen. St. 1888, § 647.

¹³ St. & C. St. 1896, p. 1809, ¶ 2.

¹⁴ Code, 1897, § 3388.

¹⁵ St. 1894, § 1607.

¹⁶ Rev. St. 1889, § 4800.

¹⁷ Pub. St. 1891, ch. 196, § 7.

¹⁸ Code, 1883, § 1504.

the necessity of administration in the usual form results from the absence of legislation directing the management of escheated estates. But in some States administration in the ordinary sense is excluded by the authority vested in the escheator, or ^{Administration by escheator.} person acting for the State, with respect to property escheated. Such seems to be the case in Delaware,¹ Georgia,² Indiana,³ Mississippi,⁴ Ohio,⁵ Pennsylvania,⁶ Rhode Island,⁷ South Carolina,⁸ Tennessee,⁹ Virginia,¹⁰ and West Virginia.

¹ Upon inquest and finding that decedent left property and no heirs, the escheator seizes the goods and causes them to be sold, unless the person in possession gives bond that he will traverse at the next term of the court: Laws, 1874, p. 467, §§ 8 *et seq.*

² Code, 1895, §§ 3577, 7692.

³ Burns' Ann. St. 1894, §§ 1157, 2633, 7692.

⁴ Code, 1892, § 1708.

⁵ Bates' Ann. St. 1897, § 4163.

⁶ West's Appeal, 64 Pa. St. 186, 193.

⁷ Haigh *v.* Haigh, 9 R. I. 26, 29.

⁸ Rev. St. 1882, § 2310.

⁹ Code, 1884, § 2962.

¹⁰ Code, 1887, §§ 2371 *et seq.*; *Watson v. Lyle*, 4 Leigh, 236, 246.

*TITLE SECOND.

[* 312]

OF THE INSTRUMENTALITIES EFFECTING THE DEVOLUTION.

§ 136. **Tribunals and Officers employed by the Law to accomplish the Devolution.**— Having in the preceding pages pointed out the principles which determine the succession of property upon the death of its owner, and considered the various channels through which it descends to the new owners, it seems natural now, in the further development of our subject, to examine the instrumentalities employed by the law to accomplish and control the devolution. It seems more convenient, in doing this, though not, perhaps, in strictly logical sequence, to consider, in the first place, the nature, scope, and power of the various courts and tribunals armed with jurisdiction in this respect; and, next, the nature and extent of the authority of those officers whom the law intrusts with the active administration of the estates of deceased persons, — appointed, or at least confirmed, by these courts and tribunals, and amenable to them for their official conduct, but deriving their authority directly from the law, which determines the scope of their powers, duties, and liabilities, and whose office it is to personate the deceased in all matters touching the legal disposition of his property.

OF THE TRIBUNALS CONTROLLING THE ADMINISTRATION OF THE ESTATES OF DECEASED PERSONS.

CHAPTER XIV.

PROBATE POWERS AS EXISTING AT COMMON LAW AND UNDER ENGLISH STATUTES.

§ 137. **Origin of the Ecclesiastical Jurisdiction over the Probate of Wills.** — Surrogate Bradford, in the Introductory Note to his series of Surrogate Reports, gives a concise and lucid account of the origin of the ecclesiastical jurisdiction over the probate of wills and the administration of the estates of deceased persons, evincing great learning, and a thorough investigation of the historical development of the jurisdiction, and of the rules and principles of the civil law as affecting this department of jurisprudence.¹ It is indispensable to a proper understanding of the nature of probate courts in the United States to travel over the same ground, to some extent at least, in order to gain an insight into the principles and doctrines of the common, civil, and canon law constituting the unwritten presuppositions, tacitly understood and premised, of American statutes regulating the administration of the estates of deceased persons. Much that seems contradictory, capricious, or incomprehensible in the several enactments and decisions, will be seen to harmonize, and the principles of the civil and canon law, vitalizing the dry formulæ of the common law, will serve to fill out and round off the statutory provisions.²

[* 314] * This branch of English jurisprudence, or rather of practice under the common law, was for a long time, and

¹ 1 Bradf. v. *et seq.*

² Courts of probate "exercise many powers solely by virtue of our statutes; but they have a very extensive jurisdiction not conferred by statute, but by a general reference to the existing law of

the land, that is, to that branch of the common law known and acted upon for ages, the probate or ecclesiastical law": Bell, C. J., in *Morgan v. Dodge*, 44 N. H. 255, 258. And see *post*, § 149, on the procedure in probate courts.

until quite recently, known as well by the name of ecclesiastical as by that of testamentary or probate law, because the clergy had assumed testamentary jurisdiction and exercised it in their spiritual courts. Just when this authority was first asserted does not very clearly appear; but on the Continent certainly before the reign of Justinian,¹ because he undertook to curb the practice by an edict.² "But," says Selden, "here we see that the clergy, even in those days, had set their foot upon the business; and I suppose that since that time they never pulled it wholly out again."³ In England, although the claim and practice of spiritual courts in this particular is said to have been originally a mere usurpation,⁴ it became a privilege enjoyed by them, not as a matter of ecclesiastical right, but, as Blackstone puts it, by the special favor and indulgence of the municipal law,⁵ producing what he terms "a peculiar constitution" of the island.

This jurisdiction, exercised in the county court, where the bishop and the earl sat conjointly for the transaction of business until the separation of the ecclesiastical from the secular jurisdiction by William the Conqueror,⁶ was plausibly claimed by bishop, as being in harmony with the customs of the Normans, and the civil and canon law, which gave to bishops the charge of the execution of testaments containing bequests *in pios usus*.⁷ It is certain, says Bradford, that the constitution of the ecclesiastical tribunals was authorized by William; and that their jurisdiction included the probate of wills soon after, if not from the instant of separation from the county courts, is almost capable of direct proof.⁸

* But as the jurisdiction before the Norman Conquest was [* 315] a purely lay jurisdiction, exercised not only in the county courts, courts of hundred or tithing, but also, by special custom or franchise, in local courts in which the earl, the lord of the manor, the municipal magistrate, or other civil officer presided, those courts that were such by special custom or franchise retained their powers in this respect; there were many lay courts in England exercising

¹ A. D. 527-565.

² "And also by a mulct of 50 pound weight of gold, saying *Absurdum est namque si promiscuis actibus rerum turbentur officia, et alii creditum alius subtrahat; ac præcipue Clericis, quibus opprobrium est, si peritas se velint Disceptationum esse Forensium ostendere*": Spelman, Prob. of Wills, (Posthumous Works), 129; 3 Blackst. 96.

³ Spelman, 129.

⁴ See note appended to Hensloe's Case, in 9 Co. 37, 41; Spelman, *supra*; 4 Burn's Eccl. Law, 291; 3 Blackst. 95.

⁵ 3 Blackst. 95, quoting from Linde-

wode, "the ablest canonist of the fifteenth century," and from a canon of the Archbishop Stratford to show that testamentary causes and the administration of intestates' goods was *ab olim* granted to the ordinary *consensu regio et magnatum regni Angliæ*.

⁶ 2 Burn's Eccl. Law, 33; Spelman, 131.

⁷ 1 Bradf. xxii.

⁸ 1 Bradf. xxii.; 3 Blackst. 96; Spelman, 131; 4 Burn's Eccl. Law, 291; Hensloe's Case, citing numerous ancient authorities, 9 Co. 37.

testamentary jurisdiction, of indefinite antiquity or of Saxon origin, when the act establishing courts of probate¹ was passed.²

§ 138. **Origin of Administration in England.**—Anciently, says Blackstone,³ the king, as *parens patriæ*, seized upon the goods of persons dying intestate and administered them through his ministers of justice, probably in the county court; and the prerogative was granted as a franchise to many lords of manors, and others, who continued to hold, by prescription, the right to grant administration to their intestate tenants and suitors in their own courts baron.⁴ While the franchise so granted remained in the prerogative and prescriptive courts for many centuries, and until the passage of the Probate Act, together with the jurisdiction to grant probate of wills of personalty,⁵ the jurisdiction formerly exercised by the king or his representatives was vested in favor of the Church in prelates, "because it was intended by the law that spiritual men are of better conscience than laymen, and that they have more knowledge what things would conduce to the benefit of the soul of the testator than laymen have."⁶ The Church, accordingly, obtained the supervision of the distribution, or administration, of the personal property of intestates; the ordinary might seize them and keep them without wasting, and also might give, alien, or sell them at his will, and dispose of the money *in pios usus*. "So that," says Blackstone, "properly the whole interest and power which were granted to the ordinary were only those of being the king's almoner within his diocese, in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious."⁷

[* 316] * The trust thus vested in the ordinary was most solemn and conscientious in its nature. The reverend prelates were not accountable to any but to God and themselves for their conduct. "If he [the ordinary] did otherwise [than dispose of the money *in pios usus*], he broke the confidence which the law reposed in him."⁸ "The common law did not make him, being a spiritual governor, subject to temporal suits for such things. And this was a great defect in the common law."⁹ The trust was, in the course of time, grossly abused. The Popish clergy, says Blackstone, took to themselves (under the name of the Church and poor) the whole residue of the estate of the deceased, after the *partes rationabiles*, or two-

¹ 20 & 21 Vict. c. 77.

² 1 Bradf. xix.; Foster's "Doctors' Commons": see *post*, § 204.

³ 2 Comm. 494.

⁴ *Ibid*.

⁵ *Ante*, § 137.

⁶ Perk. Prof. Book, § 486.

⁷ 2 Bl. 494, 495. Surrogate Bradford calls attention to the omission of the 32d

article of Magna Charta in the charter of Henry III., as to the payment of the debts of the deceased; an omission, he says, which is thought to have been procured by ecclesiastical influence: 1 Bradf. xxv. note (*).

⁸ 2 Blackst. 494.

⁹ Graysbrook v. Fox, 1 Plowd. R. 275, 277.

thirds, of the wife and children were deducted, without paying even his debts, or other charges thereon. This led to the enactment of the Statute of Westminster II.,¹ directing the ordinary to pay the intestate's debts so far as his goods will extend.² But even after this check to the exorbitant power of the clergy, whereby the ordinary was made liable to creditors, yet the residuum after payment of debts remained still in their hands, to be applied to whatever purpose his conscience should approve. It was the flagrant abuse of this power that again called for legislative interposition; by the statute of 31 Edw. III. c. 11, the estates of deceased persons were directed to be administered by the next of kin of the deceased, if he left no will, and not by the ordinary or any of his immediate dependants. This statute originated the system of confiding the settlement of the estates of intestates by their next of blood, appointed by the ordinary,³ putting them, with respect to suits and accounting, upon the same footing with executors, and making them officers of the ordinary.⁴

§ 139. **Powers of Ecclesiastical Courts in England.**—The common law of England, as affected by the statutes above named,⁵ and such of those noticed below as were enacted before the settlement of the American Colonies, is at the basis of the American *statutes concerning administration, and the law in the [*317] American States in so far as it has not been supplanted by their own statutes. It is therefore necessary to follow still further the history of the English law on this subject.

By the statute of 21 Henry VIII. c. 5, the discretion of the ordinary in the appointment of administrators to intestate estates was enlarged, so as to authorize the appointment of *either* the widow, *or* the next of kin, *or both*, at the ordinary's pleasure; and in the case of two or more persons of the same degree of kindred he might appoint whichever he pleased.⁶

The Statute of Distributions⁷ destroyed the common-law right to the *pars rationabilis*, and made the estate distributable among the widow and next of kin, leaving still, however, in the hands of the administrator, for his own use, the third formerly retained by the Church, until finally, by the statute of 1 Jac. II. c. 17, this third was made distributable, as well as the remainder of the intestate's estate.⁸

¹ 13 Edw. I. c. 19.

² "A use more truly pious than any requiem or mass for his soul": 2 Blackst. 495.

³ The process ran in the name and under the seal of the bishop: 1 Bradf. xxvi. note *l*.

⁴ Hensloe's Case, 9 Co. 39; 2 Blackst. 496.

⁵ 13 Edw. I. c. 19; 31 Edw. III. c. 11.

⁶ 2 Bla. Comm. *496.

⁷ 22 & 23 Car. II. c. 10; 29 Car. II. c. 30.

⁸ 1 Bradf. xxvi.

The powers of the spiritual courts were thus restricted to the judicial cognizance of the class of cases arising out of the probate of wills, the grant of administration, and the payment of legacies, and thus remained until, by the statute creating the court of probate,¹ their powers in this respect were wholly abrogated. The authority to appoint administrators, and to take proof of wills, resided in the bishop of the diocese wherein the testator or intestate dwelt at the time of his death, unless he left effects to such an amount as to be considered notable goods (*bona notabilia*, fixed by the ninety-third of the canons at the value of £5 or over) within some other diocese or peculiar; in such case the will was to be proved before the metropolitan of the province by way of prerogative, whence the courts, where the validity of such wills was tried, and the offices where they were registered, were called the prerogative offices of Canterbury and York.²

Ecclesiastical jurisdiction over estates of deceased persons.

Statute creating Court of Probate.

This spiritual jurisdiction of testamentary causes is described by Blackstone as "a peculiar constitution of this [*318] island; for in *almost all other, even Popish countries, all matters testamentary are under the jurisdiction of the temporal magistrate."³ It was exercised by the consistory courts of diocesan bishops, and in the prerogative court of the metropolitan, generally, and in the arches court and court of delegates by way of appeal. It is divisible into three branches, the probate of wills, the granting of administrations, and the suing for legacies, in respect to the latter of which the jurisdiction is concurrent with courts of equity.⁴

Nature of spiritual jurisdiction.

As the rules of the canon and civil law had been adopted by the ecclesiastical courts, they gradually became the basis of the ecclesiastical law, prevailing, not *proprio vigore*, but only so far as the custom and prescription have admitted them in the spiritual courts.⁵ "The proceedings in the ecclesiastical courts," says Blackstone,⁶ "are therefore regulated according to the practice of the canon and civil law; or rather, according to a mixture of both, corrected and new-modelled by their own peculiar usages and the interposition of courts of common law. . . . When all pleadings and proofs are concluded, they are referred to the consideration, not of a jury, but of a single judge, who *takes information* by hearing advocates on both sides, who thereupon forms his *interlocutory decree*, or *definitive sentence*, at his own discretion, which, if not appealed from in fifteen days, is final by the statute of 25 Henry VIII. c. 19.

¹ 20 & 21 Vict. c. 77.

² Wms. Ex. [289].

³ 3 Bla. Comm. *95.

⁴ 3 Bla. Comm. *97, 98.

⁵ 1 Bradf. xxvi. citing Hale's Hist. Com. L. 28.

⁶ 3 Bla. Comm. *100.

“But the point in which these jurisdictions are most defective is that of enforcing their sentences when pronounced, for which they have no other process but that of *excommunication*; which is described to be twofold: the less and the greater excommunications.”¹

Ordinary could enforce his judgment by excommunication only.

§ 140. **Probate Jurisdiction in other English Courts.** — The extent of jurisdiction exercised by the ecclesiastical courts of England included but a small proportion of the judicial authority involved in the adjudication of questions arising in the settlement of dead men’s estates. To some extent, the power to pass upon the accounts of executors and administrators, if no trial of issues, * either of [* 319] fact or law, was necessary, and to grant them a

Powers in ecclesiastical courts but a small proportion of judicial control over executors and administrators.

discharge after a true accounting, seems to have been exercised by the ecclesiastical tribunals.² But the trial of disputed accounts, involving the testimony of witnesses, questions of devastavit, liability to creditors, legatees, and distributives, the marshalling of assets, recourse to real estate for the payment of debts and legacies, etc., — in short, the control over executors and administrators in every respect not included in the probate of wills, appointment of administrators, and payment of legacies, — was exclusively in the common-law and chancery courts, as well as the appointment and removal of guardians and curators to minors and persons of unsound mind, and the control over them in respect of the management of their estates. It should therefore

Residue of such powers in courts of law and equity.

be remembered that there is a very great difference between the totality of the powers exercised by the English courts in connection with the administration of estates of deceased persons, sometimes called testamentary or probate jurisdiction, and the testamentary or probate jurisdiction of ecclesiastical courts, — a distinction which is of the utmost importance in ascertaining the conclusiveness of the judgments and decrees of the several classes of courts in collateral proceedings, and also in comparing the relative powers of ecclesiastical courts with those of American probate courts. For although the tribunals established in the Colonies were at first modelled after those of the mother country, whose functions they were to perform, so that they were to some extent governed by the rules of the civil and canon law, and in some instances took even the name of their prototypes, yet in the course of time they were invested with greater powers and jurisdiction,³ and to fit them for

Difference between powers of English testamentary courts and American probate courts.

¹ By act of 53 Geo. III. c. 127, the sentence of excommunication was displaced by the writ *de contumace capiendo*, issued out of chancery upon the *significavit* of the ecclesiastical court.

² Swinb. on Wills, pt. 6, § 21; 4 Burn’s Eccl. L. 609 (9th ed.); Wms. Ex. [2060]; Toll. Ex. & Adm. 495. See *post*, §§ 498 *et seq.*, on the subject of accounting.

³ “The powers of the probate courts

the efficient exercise of the new functions invested in them, [* 320] they were made * courts of record, with a public seal and a clerk; have organized process and executive officers, stated terms, and continued functions.¹ The several legislatures, being at perfect liberty to adapt the constitution and powers of the courts to the requirements and convenience of the people, invested these tribunals, not only with the powers possessed by the spiritual courts in England, but, in most instances, with all the powers possessed by the English ecclesiastical, common law, and chancery courts, in so far as they were necessary to control the administration of decedents' estates; and within the sphere of the jurisdiction conferred upon them they are a branch of the judiciary of the State, as much so as any other court of general or plenary power.²

have been gradually increased by a series of state and provincial statutes reaching back to the time of their separation from the common-law courts. Jurisdiction has been given them of matters formerly within the exclusive cognizance of the courts of common law, and not analogous to any proceedings of the probate court as a court of ecclesiastical jurisdiction. Those various statutes, based upon the

suggestions of practical experience, and passed with the view of promoting the prompt and economical disposition of the matters to which they relate, have resulted in the large jurisdiction now exercised by probate courts": Smith's Prob. Law (Mass.), ch. 1.

¹ *Obert v. Hammel*, 18 N. J. L. 73, 79.

² *Miller v. Iron County*, 29 Mo. 122.

* CHAPTER XV.

[* 321]

NATURE OF PROBATE COURTS IN AMERICA.

§ 141. **Origin of Probate Courts in America.**—The essential characteristics of courts whose office it is to control the administration of estates not owned by persons competent to act *sui juris*, have been indicated in an earlier chapter.¹ It will appear from the consideration of the nature, power, and scope of the courts intrusted with this species of jurisdiction in the several American States, to what extent the principle, there mentioned as resulting from the nature of property and the office of the State, has been practically realized and found recognition in the statute-books. It is easy to understand why this principle was so inadequately recognized, and never expressed as an organic element of the law, in England. The only courts exercising a peculiar jurisdiction over the subject, the present court of probates, taking the place of the former ecclesiastical and manorial courts, extend their control over a part only of the subject; another portion falls exclusively within the province of chancery courts, who treat executors and administrators as trustees; while yet another element of the functions of these officers is dealt with in the courts of common law. However incongruous such a system might have been recognized to be, and however strongly a change might have been desired, the conservative spirit of the English people and the peculiarity of the English constitution are unfavorable to reform in this direction. Prescriptive rights and prerogatives are tenaciously adhered to. The habits, customs, and practices of the people, the bar, and the bench represent a *vis inertiae* to overcome which the impetus must be powerful indeed. The statute creating the new court of probates, thereby abrogating the secular jurisdiction of the spiritual courts, strongly illustrates the intense conservatism of even the legislative branch of the English government, in the pension which it was found necessary to grant to the * bishops and archbishops, and even to the proctors practising in these courts, to compensate them for the loss of their lucrative privileges. [* 322]

But in America circumstances have been peculiarly favorable to the rational development of this principle. Ecclesiastical courts

¹ *Ante*, § 11.

with secular powers did not exist. Prerogatives and prescriptive rights were swept away by the republican spirit of the people. The legislatures were unhampered by the traditions and customs of the mother country, armed with full authority to carry out the views and convictions of the people, who thus exerted a controlling influence in shaping the law and regulating the practice of managing and settling estates of deceased persons and minors; for no branch of the law concerns the general public so universally, and affects their interests so directly, as this. The consequence has been a rapid development of the law of administration, particularly in those States which early cut loose from the common-law doctrines in this respect. The American courts of probate, with their extensive powers, their simple and efficient procedure, their happy adaptation to the wants of the people in the safe, speedy, and inexpensive settlement of the estates of deceased persons attest the marvellously clear insight of the people of the Colonies and young States into the principles involved, and the genuine instinct which guided them in their realization. Necessarily diverse in their details, as the systems of the several States cannot but be, since each State enacts its own code, there is a common intendment of them all in the direction of recognizing the law of administration as a distinct, independent branch of jurisdiction, based upon and determined by its own inherent principles. The rich and manifold experiences of a century of unexampled national growth and development have tended to mould these systems in the national spirit common to all the States; as each is the reflex of the nation, so their institutions are rapidly assimilating into a national system, in which the incongruities incidental to the experimental enactments of the several and independent legislatures are gradually disappearing before the light of common experience and intelligent discussion.

Circumstances favoring development of the principle underlying probate courts in America.

§ 142. **American Statutes the only Source of Probate Powers in the States.** — We have seen that by the common law the entire scope of jurisdiction over the estates of deceased persons vested [*323] * in the ecclesiastical, common-law, and chancery courts.¹

Hence, there being no ecclesiastical courts in America, all such jurisdiction, in so far as it became a part of the juridical system of the States, necessarily vested in the common-law and chancery courts, to the extent in which it was not lodged elsewhere by statute. It follows from this, that although in many of the States the constitution establishes or provides for the establishment of courts of probate, yet they take all their powers from the statutes regulating them.² From this cir-

Probate courts take their powers from the statutes.

¹ *Ante*, § 140.

² *Tucker v. Harris*, 13 Ga. 1, 8; *Mc-* *Russell v. Lewis*, 3 Oreg. 380; *Pennison v. Pennisson*, 22 La. An. 131; *Pelham v. Pherson v. Cunliff*, 11 S. & R. 422, 429; *Murray*, 64 Tex. 477, 481. But in Cali-

Hence they have only such powers as are conferred either expressly or by necessary implication;

but jurisdiction conferred over any subject-matter carries with it all powers necessary to adjudicate thereon.

cumstance arises an important rule to be observed in ascertaining the extent of power lodged in any one of this class of courts: they can exercise such powers only as are directly conferred upon them by legislative enactment,¹ or necessary to carry out some power so conferred.² Unless a warrant for the exercise of jurisdiction in a particular case can be found in the statute, given either expressly or by implication, the whole proceeding is void;³ but where jurisdiction is conferred over any subject-matter, and it becomes necessary in the adjudication thereof to decide collateral matters over which no jurisdiction has been conferred, the court must, of necessity, decide such collateral issues.⁴

The courts so created took various names. In many of the States they are known as Probate Courts, or Courts of Probate, which is also the name given to the English court created in 1857, to which the jurisdiction previously exercised by ecclesiastical, manorial, and other courts * of tes- [* 324] tamentary jurisdiction was transferred. This term is indicative of one of the chief and characteristic elements of their powers, and is used in this treatise to designate all courts of this class, being at once the most convenient, familiar, and accurate.⁵ In other States

fornia, since 1879, the Superior Court is given jurisdiction of all matters in probate by the constitution, as a part of its general jurisdiction, and while sitting in probate the court is not a statutory tribunal, and does not derive its powers from the legislature, but is a court of general jurisdiction, and entitled to the same presumptions: *Burris v. Kennedy*, 108 Cal. 331 (reciting the probate history in the State); *Heydenfeldt v. Super. Ct.*, 117 Cal. 348. And in some States probate courts are given jurisdiction over matters not referable to statutes: *post*, § 149, p. * 341.

¹ *Bramell v. Cole*, 136 Mo. 201, 209; *Shafer v. Shafer*, 85 Md. 554, 558; *Erwin v. Lowry*, 1 La. An. 276; *Brittin v. Phillips*, 1 Demarest, 57, 59; *Snyder's Appeal*, 36 Pa. St. 166. Hence there can be no trial by jury in the absence of a statutory provision to that effect: *Bradley v. Woerner*, 46 Mo. App. 371.

² In New York the attempt was made, by the Revised Statutes of 1830, to limit the surrogates to the exercise of expressly conferred powers. But it was found that the exercise of incidental powers was essential to the due administration of justice: *Dayton on Surr.* 4; *Pew v. Hastings*,

1 Barb. Ch. 452. The restrictive clause in the Revised Statutes was accordingly repealed, and the exercise of necessary incidental powers restored to the surrogates: *Laws*, 1837, p. 536, § 71; *Sipperly v. Baucus*, 24 N. Y. 46; *In re Verplanck*, 91 N. Y. 439, 450.

³ *Smith v. Howard*, 86 Me. 203; *Riggs v. Cragg*, 89 N. Y. 479, 489; nor does the consent of parties confer jurisdiction: *Theller v. Such*, 57 Cal. 447, 459; *Sibley v. Waffle*, 16 N. Y. 180, 185; *Sitzman v. Pacquette*, 13 Wis. 291, 305; *Leman v. Sherman*, 18 Ill. App. 368; s. c. 117 Ill. 657.

⁴ Otherwise the end would be conceded without the means: *Baillio v. Wilson*, 5 Mart. n. s. 214, 217; *Lawson v. Ripley*, 17 La. 238, 249; *Estate of Altemus*, 32 La. An. 364, 369; *Hinckley's Estate*, Myr. 189; *Crooks' Estate*, Myr. 247; *Fowler v. Lockwood*, 3 Redf. 465; *Hyland v. Baxter*, 98 N. Y. 610, 616.

⁵ It is used in the statutes of Alabama, Connecticut, Illinois, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, and most of the new States.

they are called Orphan's Courts,¹ Ordinaries or Courts of Ordinary,² Surrogates,³ Prerogative Courts,⁴ Registers;⁵ while in many of them the jurisdiction is conferred upon courts of plenary powers,⁶ or upon the county courts,⁷ all of which, however, are known as courts of probate jurisdiction when acting upon testamentary matters, and are then governed by the principles and rules of such, and not by their method of procedure when acting as common-law, chancery, or county courts.⁸ In some States probate judges are required to give bond for the faithful discharge of their duties, constituting a lien on the property of the principal; and it is held that for a liability under such bond he cannot claim the homestead exemption;⁹ but it has no retroactive validity.¹⁰ A judge of probate cannot in his official capacity maintain a bill for the correction or prevention of public abuses.¹¹

§ 143. **Their Dignity as Courts.**—In consequence of the statutory origin of courts of probate, they have been said to be courts of limited,¹² inferior,¹³ special and limited,¹⁴ limited though not special,¹⁵ or limited though not inferior jurisdiction.¹⁶ The result of this peculiarity, *i. e.* their lack of all power save as conferred by statute, has been, in some of the States, to deprive their judgments and decrees of all validity unless the facts upon which their jurisdiction depends appear affirmatively from the face of their proceedings.¹⁷

Judgments
invalid unless
facts confer-
ring jurisdic-
tion appear
of record.

¹ In Delaware, Maryland, New Jersey, and Pennsylvania.

² In Georgia.

³ In New York and New Jersey.

⁴ New Jersey.

⁵ In Delaware, Maryland, New Jersey, and Pennsylvania.

⁶ Such as district courts, as in Nevada; circuit courts, as in Indiana, and Iowa; chancery courts, as in Mississippi and Tennessee. In North Carolina probate jurisdiction is in the Clerk of the Superior Court, as an independent and original tribunal: *Edwards v. Cobb*, 95 N. C. 4. In California the Superior Court is given general jurisdiction of all probate matters, just as in cases at law or in equity: *Burris v. Kennedy*, 108 Cal. 331.

⁷ In Colorado, Florida, Kentucky, Illinois, and South Dakota.

⁸ *Wells v. Smith*, 44 Miss. 296, 304. See *Smith v. Westerfield*, 88 Cal. 374.

⁹ *Randolph v. Brown*, 115 Ala. 677, 681.

¹⁰ *Randolph v. Billing*, 115 Ala. 683.

¹¹ *Hays n. Ahlrichs*, 115 Ala. 239, 247.

¹² *Erwin v. Lowry*, 1 La. An. 276, 278;

Snyder's Appeal, 36 Pa. St. 166; *Gallman v. Gallman*, 5 Strobb. L. 207; *Brodess v. Thompson*, 2 Harr. & G. 120; *People's Bank v. Wilcox*, 15 R. I. 258.

¹³ *Townsend v. Gordon*, 19 Cal. 188.

¹⁴ *Potwine's Appeal*, 31 Conn. 381; *Wood v. Stone*, 39 N. H. 572; *People v. Corlies*, 1 Sandf. 228, 247; *Hendrick v. Cleaveland*, 2 Vt. 329, 337; *Shafer v. Shafer*, 85 Md. 554.

¹⁵ *Obert v. Hammel*, 18 N. J. L. 73, 79; *Plume v. Howard Savings Institution*, 46 N. J. L. 211, 229.

¹⁶ *Cody v. Raynaud*, 1 Col. 272, 277; *Turner v. Malone*, 24 S. C. 398, 401.

¹⁷ *Kemp v. Kennedy*, Pet. C. C. 30, 36, *Washington, J.*, announcing that "courts of limited jurisdiction must not only act within the scope of their authority, but it must appear upon the face of their proceedings that they did so, and if this does not appear, all that they do is *coram non jndice*, and void"; *Turner v. Bank of North America*, 4 Dall. 8, 11. Both of these cases arose in federal courts, describing them as *limited*, but not *inferior* courts. The following cases originated in probate

This doctrine not generally applicable in America.

* But this view does not seem sound on principle; it ignores the character of these tribunals

as courts, and the necessity that their judgments and decrees should be binding, as authoritative announcements of the law, upon all the world. It is held that federal courts, although of limited jurisdiction, are not inferior courts in the technical sense; and that their judgments, although reversible by writ of error or appeal, are binding, although the jurisdiction be not alleged in the pleadings.¹ The doctrine that judgments of probate courts are void unless the facts upon which their jurisdiction depends appear of record arose probably from the necessity of the application of such a rule to the ecclesiastical courts of England, whose jurisdiction was exceedingly limited, which were not courts of record, possessed no means of enforcing their judgments or decrees,² and whose exercise of jurisdiction was jealously scanned by the temporal courts to guard against encroachment and usurpation. No one of these reasons exists in the United States.³ Courts of probate in America are entitled to the sanction which every court of record holds;⁴ they are not to be classed with those tribunals which have no authority beyond special powers for the performance of specific duties, little or in no wise relating to the general administration of justice, whose modes of proceeding are prescribed by the statute,⁵ but are of that class of courts whose judgments, like those of the federal courts, are held good without a recital of the facts upon which they rest.⁶ The subject of the validity of judgments and decrees of probate courts is more fully considered hereafter.⁷

* § 144. **Their Powers as Judicial Tribunals.** — They are [* 326] in most, if not all, of the States courts of record,⁸ having a

courts: *Lipe v. Mitchell*, 2 Yerg. 400, 404; *Overseers v. Gullifer*, 49 Me. 360; *Dakin v. Hudson*, 6 Cow. 221, 224; *Potwine's Appeal*, 31 Conn. 381, 383; *Shafer v. Shafer*, 85 Md. 554, 558.

¹ *Skillern v. May*, 6 Cr. 267; *McCorrick v. Sullivan*, 10 Wheat. 192, 199.

² See *ante*, § 139.

³ *Tucker v. Harris*, per Lumpkin, J., 13 Ga. 1, 8; *Fisher v. Bassett*, 9 Leigh, 119, 131; *Adams v. Adams*, 22 Vt. 50, 57.

⁴ *McPherson v. Cunliff*, 11 S. & R. 422, 429; *Hahn v. Kelly*, 34 Cal. 391. See cases cited *post*, § 145, and *Tucker v. Harris*, *supra*, in which Judge Lumpkin appealed to the legislature for an act so declaring, which responded to the call by act of 1856 (Acts, 1855-56, p. * 147): *Davie v. McDaniel*, 47 Ga. 195, 200.

⁵ Such as commissioners, surveyors, appraisers, committees, directors, over-

seers, and the like: *Obert v. Hammel*, 18 N. J. L. 73, 79.

⁶ *Grignon v. Astor*, 2 How. 319, 342; *Thompson v. Tolmie*, 2 Pet. 157, 165; *Shroyer v. Richmond*, 16 Oh. St. 455, 464; *People v. Gray*, 72 Ill. 343, 347; *Johnson v. Beazley*, 65 Mo. 250, 254; *Martin v. Robinson*, 67 Tex. 368, 374; *Acklen v. Goodman*, 77 Ala. 521; *Plume v. Howard Savings Institution*, 46 N. J. L. 211, 228; *Clark v. Costello*, 59 N. J. L. 234, 237. By statute in Rhode Island: *Angell v. Angell*, 14 R. I. 541; but see *People's Bank v. Wilcox*, 15 R. I. 258, 260.

⁷ *Post*, § 145.

⁸ *Shroyer v. Richmond*, 16 Oh. St. 455, 464; *Chase v. Whiting*, 30 Wis. 544, 547; *Milan v. Pemberton*, 12 Mo. 602; *Tebbets v. Tilton*, 24 N. H. 120, 124; *Dayton v. Mintzer*, 22 Minn. 393; *Turner v. Malone*, 24 S. C. 398, 401.

public seal and a clerk, or authority in the judge to act as clerk, organized process, and executive officers, as well as stated terms and continuing functions. Within the field of their jurisdiction they are as much a branch of the judiciary of the State as any court of general or plenary powers.¹ As judicial tribunals they have the inherent power of such to punish for contempt to the same extent as common-law courts,² to compel obedience to their orders and decrees,³ and their judgments upon matters within their jurisdiction are enforced, usually, by the same means which are at the disposal of common-law and chancery courts.⁴ Their orders, judgments, and decrees are therefore as conclusive upon the parties to the record, until reversed or annulled on appeal, writ of error, or direct proceeding in chancery for fraud, as decrees in chancery or judgments at law;⁵ but if want of jurisdiction appears from the face of the proceedings, they are, like the judgments of any court under like circumstances, merely void.⁶ Thus it has been said by very high authority on questions of probate law, that jurisdiction of the subject-matter is to be tested by the authorized extent of the powers of the court in regard to the alleged cause of action; and if the court had power to try that, did try it, and pronounced judgment thereon, the question cannot again be tried in

General powers of probate courts

to punish for contempt and compel obedience to their orders.

Their judgments are void if want of jurisdiction appear;

but collaterally conclusive otherwise.

[* 327] another court.⁷ It is, * however, asserted, on the other hand, that, where courts of probate are courts of limited jurisdiction, a distinction is to be drawn between their judgment on a fact which may be decided without deciding the case on its merits, — such judgment being collaterally assailable although the jurisdictional fact is averred of record and was actually found upon evidence heard by the court, — and judgment on a fact involved in the gist of the suit, so that it cannot be decided without involving the merits, which judgment is collaterally conclusive.⁸

¹ *Obert v. Hammel*, 18 N. J. L. 73; *Miller v. Iron County*, 29 Mo. 123.

² *Bac. Ab.*, tit. Courts and their Jurisdiction, E; *Chess's Appeal*, 4 Pa. St. 52, 54.

³ *In re Brinson*, 73 N. C. 278, 280; *Seaman v. Duryea*, 11 N. Y. 324; *Tome's Appeal*, 50 Pa. St. 285, 295; *People v. Marshall*, 7 Abb. N. Cas. 380; *Sherry's Estate*, 7 Abb. N. Cas. 390; *Stratton v. McCandliss*, 32 Kans. 512, 516; *Ex parte Hayes*, 88 Ind. 1, 5.

⁴ *McLaughlin v. McLaughlin*, 4 Oh. St. 508, 512; *Caruth v. Anderson*, 24 Miss. 60; *Yoeman v. Younger*, 83 Mo. 424, 429.

⁵ *Watson v. Hutto*, 27 Ala. 513; *Dickinson v. Hayes*, 31 Conn. 417, 422; *Tompkins v. Tompkins*, 1 Sto. 547; *Jones v.*

Coon, 5 Sm. & M. 751, 767; *Bryant v. Allen*, 6 N. H. 116; *Granbery v. Mhoon*, 1 Dev. L. 456; *Brown v. Gibson*, 1 N. & McC. 326, 328; *Cummings v. Cummings*, 123 Mass. 270, 273; *Dayton v. Mintzer*, 22 Minn. 393, 394; *Mercer v. Hogan*, 4 Mackey, 520, 527.

⁶ *Mohr v. Tulip*, 40 Wis. 66, 76; *Eppling v. Robinson*, 21 Fla. 36, 49.

⁷ *Bradford, S.*, in *Black v. Black*, 4 Bradf. 174, 204, citing *Bissell v. Briggs*, 9 Mass. 462; *Williams v. Robinson*, 63 Tex. 576, 581, citing earlier Texas cases.

⁸ *People's Bank v. Wilcox*, 15 R. I. 258, containing an extensive collection of American cases on this point. The subject is more fully treated in the sections *infra*.

Although these courts are courts of record, it does not follow that they recognize an "attorney of record." Parties in interest may appear in person, by agent, or attorney at law; they may appear by one attorney at one hearing, and by another on the next. Notice or process served upon an attorney is of no more avail than if served upon a stranger, unless the party respond to the notice or summons.¹

§ 145. **Conclusiveness of their Judgments in Collateral Proceedings.** — The development and growth of the jurisdiction of courts of probate in the United States has given occasion to considerable divergence in the authorities on the question whether their judgments are conclusive, or impeachable collaterally. The uncertainty produced by the vacillation of courts in this respect is not only perplexing to the administrators, practitioners, and judges, but injurious and sometimes ruinous to the interests of all persons concerned in the administration of estates; and particularly to the purchasers of real estate sold under the order of probate courts, who sometimes lose the fruits of their purchase because the officers of the court are not sufficiently skilled or careful to let the record show all jurisdictional facts; and to the heirs or creditors, because the risk incurred by purchasers depresses the price of the property at the sale.

On principle there seems to be no difficulty attending the question, except, perhaps, to ascertain whether the tribunal intrusted with jurisdiction in probate matters is a *court*, with *judicial functions* in the common-law sense, or whether its functions are *ministerial only*, or having no authority

* beyond special powers for the performance of specific duties [* 328] not relating to the general administration of justice.² If the latter be the case, it is obvious that, to give validity to its acts, it must affirmatively appear that everything necessary to such end has been observed. But if it be found that the tribunal is one competent to decide whether the facts in any given matter confer jurisdiction, it follows with inexorable necessity that, if it decides that it has jurisdiction, then its judgments within the scope of the subject-matters over which its authority extends, in proceedings following the lawful allegation of circumstances requiring the exercise of its power, are conclusive against all the world, unless reversed on appeal, or avoided for error or fraud in a direct proceeding. It matters not how erroneous the judgment: being a *judgment*, it is the *law* of that case, pronounced by a tribunal created for that purpose. To allow such judgment to be questioned or ignored collaterally, would be to ignore practically, and logically to destroy, the court. And it is not

¹ Hoeg v. Halsey, 2 Dem. 577; Douglas v. Folsom, 21 Nev. 441, 447.

² Ante, § 143.

necessary that the facts and circumstances upon which the jurisdiction depends shall appear upon the face of their proceedings, because, being competent to decide, and having decided, that such facts exist by assuming the jurisdiction, this matter is *adjudicated*, and cannot be collaterally questioned.¹

The English ecclesiastical and manorial courts were not courts in the common-law sense, — “they did not proceed according to the common-law,” — hence the English rule requiring them to show jurisdictional facts on the face of their proceedings.

Many of the American courts of probate were, in early colonial times, modelled after the ecclesiastical courts; hence the necessity of the same rule as applicable to their acts, and the early American cases so holding.

In the progress of time, however, most of these courts were remodelled and vested with greatly increased judicial powers, made courts of record, etc.² The reform was initiated and carried out by the legislative branch of government, — the only one having power to accomplish it, — thus compelling the judiciary to [* 329] * follow; and it is but natural, perhaps, that they followed reluctantly. Lawyers and judges were equally imbued with the doctrines of the common law which ignored the ecclesiastical courts as judicial tribunals; and they found it difficult to assign to the American probate courts a different status. And since the enlargement of their powers emanated from as many different sources as there are States, and proceeded in as many different channels, it is not strange that for a long time there was very great divergence in their decisions. It is gratifying to observe, however, that, while unanimity has by no means been attained, yet the magnitude of the divergence is gradually diminishing, in the proportion in which the principle upon which these courts rest is understood and practically realized.

Thus it is denied by the federal courts that courts of probate are in any technical sense *inferior* courts,³ and their judgments within the sphere of their jurisdiction are as conclusive as those of the circuit or any other general court, and entitled to the same intendments and presumptions in their favor. The same doctrine is held in Alabama,⁴

Courts holding judgments of probate courts unassailable collaterally.

¹ Wyatt v. Steele, 26 Ala. 639, 650; Bostwick v. Skinner, 80 Ill. 147, 152; Cox v. Thomas, 9 Gratt. 323 (announcing the rule in the case of circuit courts), 325 *et seq.*; State v. Scott, 1 Bai. 294 (showing that the same rule must apply to judgments of inferior courts), 295 *et seq.*; Morford v. Dffenbacher, 54 Mich. 593, 605, citing earlier Michigan cases.

² See *ante*, §§ 141–144.

³ Grignon v. Astor, 2 How. 319, 341; McNitt v. Turner, 16 Wall. 352, 366; Cornett v. Williams, 20 Wall. 226, 249. See *ante*, § 143.

⁴ Wyman v. Campbell, 6 Port. 219, 244; Whorton v. Moragne, 62 Ala. 201, 207; Farley v. Dunklin, 76 Ala. 530; Barclift v. Treece, 77 Ala. 528, 531; Knabe v. Rice, 106 Ala. 516.

Arkansas,¹ California,² Connecticut,³ Florida,⁴ Georgia,⁵ Illinois,⁶ Indiana,⁷ Iowa,⁸ Kansas,⁹ Kentucky,¹⁰ Louisiana,¹¹ Maine,¹² * Michigan,¹³ Mississippi,¹⁴ Missouri,¹⁵ Nebraska,¹⁶ New [* 330] Jersey,¹⁷ New Hampshire,¹⁸ New York,¹⁹ North Carolina,²⁰ Ohio,²¹ Pennsylvania,²² South Carolina,²³ South Dakota,²⁴ Texas,²⁵ Vermont,²⁶ Virginia,²⁷ and Wisconsin.²⁸ The reverse has been held

¹ *Montgomery v. Johnson*, 31 Ark. 74, 83; *Sturdy v. Jacoway*, 19 Ark. 499, 514; *Borden v. State*, 11 Ark. 519, 525; *Rogers v. Wilson*, 13 Ark. 507, 509.

² *Burris v. Kennedy*, 108 Cal. 331; *Hahn v. Kelly*, 34 Cal. 391, 402.

³ *Dickinson v. Hayes*, 31 Conn. 417, 422; *Judson v. Lake*, 3 Day, 318.

⁴ *Epping v. Robinson*, 21 Fla. 36.

⁵ *McDade v. Burch*, 7 Ga. 559, 562; *Doe v. Roe*, 30 Ga. 961; *Patterson v. Lemon*, 50 Ga. 231, 236; *Veach v. Rice*, 131 U. S. 293.

⁶ *Iverson v. Loberg*, 26 Ill. 179, 182; *Moore v. Neil*, 39 Ill. 256, 262; *Logan v. Williams*, 76 Ill. 175; *Andrews v. Bernhardt*, 87 Ill. 365; *Goodbody v. Goodbody*, 95 Ill. 456, 460; *McCormack v. Kimmel*, 4 Ill. App. 121, 124.

⁷ *Dequindre v. Williams*, 31 Ind. 444, 454.

⁸ *Read v. Howe*, 39 Iowa, 553, 559, *et seq.*, citing numerous Iowa cases; *Myers v. Davis*, 47 Iowa, 325. (See the case of *Cooper v. Sunderland*, 3 Iowa, 114, 134, in which the doctrine announced in the federal cases is criticised.)

⁹ *Bryan v. Bauder*, 23 Kans. 95, 97.

¹⁰ *Fletcher v. Wier*, 7 Dana, 345, 347 (this case holds the assumption of jurisdiction by probate courts to be *prima facie* evidence of the jurisdictional facts); *Masters v. Bienker*, 87 Ky. 1.

¹¹ *Sizemore v. Wedge*, 20 La. An. 124; *Barbee v. Perkins*, 23 La. An. 331; *Duckworth v. Vaughan*, 27 La. An. 599; *Green v. Baptist Church*, 27 La. An. 563; *Wisdom v. Parker*, 31 La. An. 52; *Simmons v. Saul*, 138 U. S. 439.

¹² *Bent v. Weeks*, 44 Me. 45, 47; *Record v. Howard*, 58 Me. 225, 228.

¹³ *Coon v. Fry*, 6 Mich. 506, 508; *Woods v. Monroe*, 17 Mich. 238; *Osman v. Traphagen*, 23 Mich. 80; *Alexander v. Rice*, 52 Mich. 451, 454.

¹⁴ *Ames v. Williams*, 72 Miss. 760, 771; *Jones v. Coon*, 5 Sm. & M. 751, 767.

¹⁵ *Johnson v. Beazley*, 65 Mo. 250; *Camden v. Plain*, 91 Mo. 117, 129; *Rottmann v. Schmucker*, 94 Mo. 139; *Williams v. Mitchell*, 112 Mo. 300, 308; *Macey v. Stark*, 116 Mo. 481, 494.

¹⁶ *Alexander v. Alexander*, 26 Neb. 68, 75; *Missouri P. R. Co. v. Bradley*, 51 Neb. 596, 605.

¹⁷ *Plume v. Howard Saving Institution*, 46 N. J. L. 211; *Obert v. Hammel*, 18 N. J. L. 73, 80; *Clark v. Costello*, 59 N. J. L. 234.

¹⁸ *Merrill v. Harris*, 26 N. H. 142, 147; *Kimball v. Fisk*, 39 N. H. 110; *Gordon v. Gordon*, 55 N. H. 399, 401, *et seq.*

¹⁹ By statute, in this State, judgments of probate courts (surrogates) are held good unless shown to be without jurisdiction, the *onus probandi* resting upon those who assail the validity: *Wood v. McChesney*, 40 Barb. 417, 421; *Forbes v. Halsey*, 26 N. Y. 53, 65; *Richmond v. Foote*, 3 Lans. 244, 253; *O'Connor v. Hugins*, 113 N. Y. 511, 516.

²⁰ *Overton v. Cranford*, 7 Jones L. 415.

²¹ *Shroyer v. Richmond*, 16 Oh. St. 455, 465; *Sheldon v. Newton*, 3 Oh. St. 494, 500.

²² *McPherson v. Cunliff*, 11 S. & R. 422, 432; *West v. Cochran*, 104 Pa. St. 482, 488, citing earlier Pennsylvania cases.

²³ *Turner v. Malone*, 24 S. C. 398.

²⁴ Code, Dakota, 1887, § 5651. See *Matson v. Swenson*, 5 S. Dak. 191.

²⁵ *Lynch v. Baxter*, 4 Tex. 431; *Hurley v. Barnard*, 48 Tex. 83, 87; *Guilford v. Love*, 49 Tex. 715, 739; *Pelham v. Murray*, 64 Tex. 477; *Martin v. Robinson*, 67 Tex. 368.

²⁶ *Tryon v. Tryon*, 16 Vt. 313, 317; *Doolittle v. Holton*, 28 Vt. 819, 823.

²⁷ *Fisher v. Bassett*, 9 Leigh, 119, 131.

²⁸ Gary, Pr. L., § 24, citing *Barker v. Barker*, 14 Wis. 131, 147. See *Portz v. Schantz*, 70 Wis. 497, 505.

in many of these States, until the law was changed by legislation, or until the courts, on principle, reversed their former doctrine; but instances are not wanting in which the doctrine is ruled both ways in the same State, under the same statute, and under circumstances presenting no essential difference. It has been held that substantial compliance with the statutory requirements must be affirmatively shown by the record to secure the validity of judgments of probate courts against collateral assailability, in California,¹ Colorado,² Massachusetts,³ Mississippi,⁴ Tennessee,⁵ and Wisconsin,⁶ beside numerous cases involving the validity of probate powers, where the owner of property had been erroneously adjudged to be dead,⁷ or where the deceased was in fact domiciled in a county other than that within which letters were granted.⁸

Courts holding such judgments not conclusive in collateral proceedings.

[* 331] * § 146. **How far Probate Courts may correct their Judgments.** — The orders, decrees, and judgments of probate courts, in so far as they are courts of record, can be known by their record alone,⁹ which necessarily imports absolute verity, and can neither be questioned nor falsified;¹⁰ from which it follows that the court is bound by its own record, and can neither change nor disregard its orders, judgments, or decrees after the lapse of the term at which they were rendered.¹¹ It is consistent with this principle that it is the duty of a court, if the judgment, decree, or order is clearly void for the want of jurisdiction, or other defect apparent from the record, to vacate the same upon proper application;¹² hence letters of administration

Probate courts speak by their record only,

which imports absolute verity,

and cannot be modified after the close of the term.

But the record of void judgments, etc., may be vacated.

¹ Haynes v. Meeks, 20 Cal. 288, 314, *et seq.*; Estate of Boland, 55 Cal. 310, 315. The statutory amendments and constitutional changes altering the law in this respect are referred to in Burris v. Kennedy, 108 Cal. 331.

² Vance v. Maroney, 4 Col. 47.

³ Holyoke v. Haskins, 5 Pick. 20; s. c. 9 Pick. 259; Thayer v. Winchester, 133 Mass. 447.

⁴ Learned v. Matthews, 40 Miss. 210. But equity will grant relief to avoid injustice: Gaines v. Kennedy, 53 Miss. 103, 109; Hill v. Billingsly, 53 Miss. 111, 116.

⁵ Hopper v. Fisher, 2 Head, 253, 257; Whitmore v. Johnson, 10 Humph. 610; Linnville v. Darby, 1 Baxt. 306, 311.

⁶ Gibbs v. Shaw, 17 Wis. 197; Howe v. McGivern, 25 Wis. 525; Blodgett v. Hitt, 29 Wis. 169; Chase v. Ross, 36 Wis. 267, 275.

⁷ As to which see *post*, §§ 208 *et seq.*

⁸ On which point see *post*, § 204.

⁹ Milan v. Pemberton, 12 Mo. 598; Rutherford v. Crawford, 53 Ga. 138, 143.

¹⁰ Hahn v. Kelly, 34 Cal. 391, 405; Shroyer v. Richmond, 16 Oh. St. 455, 466; Selin v. Snyder, 7 S. & R. 166, 172; Kennedy v. Wachsmuth, 12 S. & R. 171, 175; 18 Vin. Abr., t. Record, p. 173, § 4.

¹¹ Johnson v. Johnson, 26 Oh. St. 357; Alexander v. Nelson, 42 Ala. 462; Bryant v. Horn, 42 Ala. 496; Wolf v. Banks, 41 Ark. 104, 107; State v. Probate Court, 33 Minn. 94; Browder v. Faulkner, 82 Ala. 257; Hitchcock v. Judge, 99 Mich. 128; Leavins v. Ewins, 67 Vt. 256.

¹² Johnson v. Johnson, 40 Ala. 247, 251 (citing Stickney v. Davis, 17 Pick. 169; Mobley v. Mobley, 9 Ga. 247); Huntington v. Finch, 3 Oh. St. 445, 448 (holding the power to vacate for *irregularity or improper conduct* in procuring the entry);

obtained by fraud may be revoked and granted to others,¹ and probate of a will obtained by fraud set aside.² So it was held in Vermont that probate courts have power to reopen a former decree, so as to charge the administrator with advancements and assets omitted from the decree.³ But in the absence of statutory grant of power to open orders and decrees, or to grant rehearing to litigants, they have no power to revise their decisions on the ground of error, either of law or fact;⁴ except, as will be more fully * noticed [* 332] below, during the continuance of the term at which they were rendered.⁵

In some States probate courts review their judgments for fraud or mistake.

In some of the States, however, probate courts are authorized by statute to review, set aside, annul, or alter their judgments on proper allegations, by parties interested, if fraud or mistake be shown;⁶ and in

McCabe v. Lewis, 76 Mo. 296, 301; *In re Gragg*, 32 Minn. 142.

¹ Marston v. Wilcox, 2 Ill. 60; Perley v. Sands, 3 Edw. Ch. 325, 328, holding that a misstatement of facts is a "false representation," under the statute, authorizing the surrogate to revoke the letters obtained thereby; Mullanphy v. County Court, 6 Mo. 563. See on these points *post*, § 268.

² Hotchkiss v. Ladd, 62 Vt. 209; Hamberlin v. Terry, 1 Sm. & M. Ch. 589. See the subject of the revocation of probate treated *post*, §§ 227, 268.

³ On the ground that power to revise previous proceedings are incidental to all courts of general jurisdiction, including probate courts, to which this power is peculiarly necessary: Adams v. Adams, 21 Vt. 162, 166; Hotchkiss v. Ladd, *supra*, reaffirming and extending this power. The reasoning employed does not seem to establish either the necessity or the wisdom of allowing probate courts to open judgments rendered at a former term, except for clearly apparent lack of jurisdiction. The case of French v. Winsor, 24 Vt. 402, 407, sometimes cited in support of the same proposition, establishes only the right to correct annual settlements at or before final settlement. But in California the order of the Superior Court settling the annual account of testamentary trustees, erroneously purported to fix the date of an annuity contrary to the previous express decision of the same court, was allowed to be amended: Estate of Pratt, 119 Cal. 153.

⁴ Daly, J., acting as surrogate, in the thoroughly considered case of Brick's Estate, 15 Abb. Pr. 12, 36, thus states his *résumé* of the numerous authorities by him consulted: "They may undo what has been done through fraud, or upon the supposition that they had jurisdiction, or on the assumption that a party was dead who is living, or that there was no will; or they may open decrees taken by default, or correct mistakes, the result of oversight or accident. . . . But when all the parties in interest have been represented at the hearing, and the court has given its final sentence or decree, I know of no authority, showing that these courts have ever exercised the general power of opening and reversing it again, upon the ground that they had erred as to the law, or had decided erroneously upon the facts."

⁵ *Infra*, p. *333.

⁶ See *post*, § 507, on Final Settlements. In Mississippi, where it had been held that a bill of review would not lie in the probate court (*Farmers' & Merchants' Bank v. Tappan*, 5 Sm. & M. 112), and that its judgments and orders were final and could not be set aside or annulled in that court at a subsequent term (*Hendricks v. Huddleston*, 5 Sm. & M. 422), power to that effect was vested in probate courts by act of 1846: *Hooker v. Hooker*, 10 Sm. & M. 599; *Austin v. Lamar*, 23 Miss. 189. In New Jersey the statutory provision making settlements conclusive and final "except when fraud or mistake can be shown to the satisfaction of the court,"

others this power is held to inhere in probate as well as all other courts.¹ In New York, where this power is granted by statute, it is held that the party complaining of an adverse decision should be denied a rehearing, and left to his remedy by appeal, unless he can bring himself squarely within the rules laid down by the court of appeals for a rehearing or reargument in that court;² "the power is undoubtedly given [* 333] *to the surrogate to open a decree, even after the time for appeal has passed, and correct a palpable mistake if the moving party shows fraud, deception, or excusable negligence in connection with the alleged error."³ The grant of power to the probate court to review and set aside its orders for fraud or mistake does not deprive a superior court of its equity power in the matter.⁴

But the rule applicable to all common-law courts, that during the continuance of the term the record remains in the breast of the judge,⁵ and the record as well as the judgment itself may be altered, revised, or revoked, as well as amended in respect of clerical errors and matters of form,⁶ is equally applicable to probate courts.⁷ "All the days of the term are considered as one, and everything is in the power of the court during its continuance."⁸ But this power must not be exercised unless the parties to be

In some, power is held to inhere in probate courts.

During the term the record as well as the judgment itself may be altered,

if notice be given to the party affected thereby.

is held not to clothe the court with a discretion merely, but as equivalent to a positive enactment depriving the judgment of its conclusive character if fraud or mistake can be shown: *Crombie v. Engle*, 19 N. J. L. 82. Similarly in New York: *Campbell v. Thatcher*, 54 Barb. 382; *Janssen v. Wemple*, 3 Redf. 229; *Matter of Hawley*, 36 Hun, 258, 260; but see s. c. 104 N. Y. 250, 259. The statute making provision for the correction of accounts of executors and administrators, the modes of correction, and the remedies therein prescribed, must be followed: *Johnson v. Johnson*, 26 Oh. St. 357, 364. See also, to similar effect, *McDermott v. Hayes*, 60 N. H. 9. In Alabama provision is made by statute for the correction of an incorrect description of lands sold under probate decree, at the instance of the purchaser: *Lee v. Williams*, 85 Ala. 189.

¹ *Adams v. Adams*, *supra*; *Milne's Appeal*, 99 Pa. St. 483, 489; *Montgomery v. Williamson*, 37 Md. 421, 428; *Bowers v. Hammond*, 139 Mass. 360, 365; *Vreedenburg v. Calf*, 9 Pai. 128, 129; *Bronson v. Burnett*, 1 Chand. 136, 140; *Fortson v. Alford*, 62 Tex. 576, 579. And see *Schlink v. Maxton*, 153 Ill. 447.

² *Melcher v. Stevens*, 1 Dem. 123, 130, quoting from *Mount v. Mitchell*, 32 N. Y. 702, as follows: "Motions for reargument should be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court; or that the decision is in conflict with an express statute, or with a controlling decision, to which the attention of the court was not drawn, through the neglect or inadvertence of counsel." The necessity for such a rule is emphasized by the surrogate, who calls attention to the language of *Daly, J.*, in *Curley v. Tomlinson*, 5 Daly, 283, and cites numerous other New York cases.

³ *Matter of Dey Ermand*, 24 Hun, 1, 4.

⁴ *Baker v. O'Riordan*, 65 Cal. 368; *Douglass v. Low*, 36 Hun, 497, 500; *Griffith v. Godey*, 113 U. S. 89, 93.

⁵ *Co. Litt.* 260 a.

⁶ *Freem. on Judgm.* § 69, and authorities there collected.

⁷ *Rottmann v. Schmucker*, 94 Mo. 139, 144.

⁸ *Moore v. Moore*, 1 Dev. L. 352; *Caldwell v. Lockridge*, 9 Mo. 362.

affected are present in court, or have notice, so that they may be heard if they desire;¹ and the presence of the parties, or notice to them, must appear from the record itself; no presumption of notice arises where the record is silent.² Any change or amendment must also be upon such terms as will protect the interests of third parties.³

§ 147. **Entering Judgment Nunc pro Tunc.** — The power to record a judgment or order at any time after it was rendered, and to Entering or correcting judgment *nunc pro tunc*. correct a judgment or order erroneously entered, resides in the probate courts equally with common-law courts. This power originated in the maxim, that "an act of the court shall prejudice no one,"⁴ or, as worded by Freeman, "a *delay* of the court shall prejudice no one,"⁵ and was originally employed to relieve parties from hardships arising out of the delay of courts, by entering a judgment *nunc pro tunc* as of the day on which it ought to have been rendered; but is * now resorted to for [* 334] the purpose of entering of record judgments rendered, but through inadvertence not entered, and of correcting judgments erroneously entered, *nunc pro tunc*, as they ought originally to have been entered of record.⁶

There is some difference of opinion as to the circumstances which shall be sufficient to authorize a *nunc pro tunc* entry. The purpose to be accomplished is salient enough: it is to Upon what evidence *nunc pro tunc* entries may be made. secure a true record of the precise ruling of the judge as originally pronounced, in cases where the record is silent, or inaccurate, or false. But the question here arising, How is the truth of the entry to be established? is not so easily answered. To allow it to be determined by parol evidence is to assail the inviolable

¹ Caldwell v. Lockridge, *supra*.

² Peake v. Redd, 14 Mo. 79; Freem. on Judgm. § 72, and authorities cited.

³ Ligon v. Rogers, 12 Ga. 281; Perdue v. Bradshaw, 18 Ga. 287; McCormick v. Wheeler, 36 Ill. 114, 119.

⁴ Broom's Legal Maxims, *Actus Curie neminem gravabit*, p. 122; Mitchell v. Overman, 103 U. S. 62, 65.

⁵ Freem. on Judgm. § 56.

⁶ Borer v. Chapman, 119 U. S. 587, 596; Mitchell v. Overman, *supra*, and cases cited in note thereto. The practice is now firmly established as reaching all cases in which the record is at variance with the judgment, decree, or order pronounced by the judge; and no principle is more clearly deducible from the inherent quality and nature of courts and the requirements of justice; for upon it depends the power of courts to vindicate their rulings and decisions from misstatement, perversion, or corruption, to which

otherwise they would be exposed by reason of inadvertence, misconception, or bad faith of clerical officers. But it must be confined to judgments actually announced, or proceedings actually had, inadvertently omitted from or erroneously entered of record; it cannot be permitted to supply a judgment or order which might or ought to have been, but in reality was not, rendered or made: Gray v. Brignardello, 1 Wall. 627, 636; Fetter v. Baird, 72 Mo. 389; Turner v. Benoist, 50 Mo. 145; Howell v. Morelan, 78 Ill. 162, 165. Nor can an appellate or revising court order the amendment, but only the court before which the original proceedings were had: Brooks v. Duckworth, 59 Mo. 48; Walton v. Pearson, 85 N. C. 34, 48; Binns v. State, 35 Ark. 118, 119. In Brooks v. Brooks, 52 Kans. 562, the entry was held properly made by the succeeding judge of the same court.

character and conclusiveness of the record (without which there can be neither stability of legal rights, nor confidence in the unbending justice and integrity of courts), by subordinating it to the memory of witnesses who may be produced by interested parties.¹ If, on the other hand, the recollection of the judge were alone to be relied on for the rectification of the record, the rights of parties would be placed absolutely at his mercy: confidence in the verity of the record must be impaired, even where the integrity of the judge is undoubted, for his very anxiety to do right and accomplish justice exposes him to the danger of unconsciously yielding to the powerful temptation to so frame the *nunc pro tunc* entry as to conform the judgment to his conviction of what it ought to be, — a conviction wrought, it may be,

by subsequently developed facts, or by maturer consideration.

[* 335] * The logical and safe rule seems to be that laid down in the

English statutes on this subject.² To relieve from the rigor of the common law, which interdicted *any* alteration of the proceedings after they had become a record, except ^{English statute.} during the term to which it related,³ it was first enacted "that by the misprision of a clerk . . . no process shall be annulled or discontinued by mistaking in writing one syllable or letter too much or too little; but as soon as the mistake is perceived . . . it shall be amended in due form, without giving advantage to the party that challengeth the same, because of such misprision."⁴ This statute was held to apply only to proceedings before judgment; it was subsequently enacted that the justices have power to amend the record and process as well after as before judgment.⁵ This statute, although permitting amendment of the record after judgment, still confined it to "a syllable or letter." The authority to amend was enlarged by a later statute,⁶ giving the king's judges power "to examine such records, process, words, pleas, warrants of attorney, writs, panels or return, by them and their clerks, and to reform and amend (in affirmance of the judgments of such records and processes) all that which to them in their discretion seemeth to be misprision of the clerks therein, . . . except appeals, indictments of treason, and of felonies and the outlawries of the same, so that by such misprision of the clerk no judgment shall be reversed or annulled. And if any record, process, writ, warrant of attorney, return, or panel be certified defective, otherwise than according to the writing, which thereof remaineth in the treasury, courts, or places from whence they are certified, the parties, in affirmance of the judgments of such record and process, shall have advantage to allege that the same writing is variant from the said certificate, and that found and certified, that the same variance shall be by the said judges reformed and amended according to the first writing."

¹ Perkins v. Perkins, 27 Ala. 479, 480.

⁴ 14 Edw. III. c. 6.

² Cited by Ray, J., in Makepeace v. Lukens, 27 Ind. 435, 437, *et seq.*

⁵ 9 Edw. V. St. 1, c. 4.

⁶ 8 Henry VI. c. 12.

³ Co. Litt. 260.

The rule deducible from these statutes is, that no amendment of the record can be made unless there be a mistake of the clerk, and something in the record by which the mistake can be rectified.¹

* This rule is adhered to in the federal courts,² and in the [* 336] courts of Alabama,³ California,⁴ Georgia,⁵ Illinois,⁶ Indiana,⁷ Kentucky,⁸ Maine,⁹ Mississippi,¹⁰ Missouri,¹¹ Tennessee,¹² and Texas.¹³

Where *nunc pro tunc* entries may be made upon parol evidence or memory of the judge.

In other States, entries *nunc pro tunc* are allowed upon parol evidence, or upon the memory of the judge; for instance, in Connecticut,¹⁴ Iowa,¹⁵ Maryland,¹⁶ Massachusetts,¹⁷ New Hampshire,¹⁸ New York,¹⁹ North Carolina,²⁰ Ohio,²¹ and Wisconsin.²²

¹ Ray, J., in *Makepeace v. Lukens*, *supra*, cites 1 Tidd, 713; *Wynne v. Thomas*, Willes R. 563; *Ray v. Lister*, Andrews, 351; *Bac. Abr.*, tit. Amendment, F; *Palm. 98*; *Harecourt v. Bishop*, Cro. Eliz. 497; and *Chetle v. Lees*, Carthew, 167.

² Story, J., in *Albers v. Whitney*, 1 Sto. 310, 312, holding that a mistake in the Christian name of a party, if not apparent upon some part of the record, but established by *aliunde* evidence, will not authorize an amendment of the record; *Russell v. United States*, 15 Ct. Cl. 168, 171, *Drake, C. J.*, holding that *clerical errors*, but not *errors in the judgment itself*, can be corrected under the federal statute, citing *Bank of the United States v. Moss*, 6 How. (U. S.) 31.

³ *Metcalf v. Metcalf*, 19 Ala. 319; *Dickens v. Bush*, 23 Ala. 849; *Summersett v. Summersett*, 40 Ala. 596; *Hudson v. Hudson*, 20 Ala. 364.

⁴ *Morrison v. Dapman*, 3 Cal. 255, 257; *Swain v. Naglee*, 19 Cal. 127; *De Castro v. Richardson*, 25 Cal. 49, 53; *Smith v. His Creditors*, 59 Cal. 267.

⁵ *Dixon v. Mason*, 68 Ga. 478, 480.

⁶ *Wallahan v. People*, 40 Ill. 103.

⁷ *Jenkins v. Long*, 23 Ind. 460; *Makepeace v. Lukens*, 27 Ind. 435.

⁸ *Davis v. Ballard*, 7 T. B. Mon. 603, 604; *Scroggin v. Scroggin*, 1 J. J. Marsh. 362, 364; *Bennett v. Tiernay*, 78 Ky. 580.

⁹ *Colby v. Moody*, 19 Me. 111, 113; *White v. Blake*, 74 Me. 489, 493.

¹⁰ *Russell v. McDougall*, 3 Sm. & M. 234, 248; *Moody v. Grant*, 41 Miss. 565.

¹¹ *Priest v. McMaster*, 52 Mo. 60, 62; *Allen v. Sales*, 56 Mo. 28, 35; *Blize v. Castillo*, 8 Mo. App. 290, 294, with numerous cases cited.

¹² *State v. Fields*, Peck, 140, 141.

¹³ *Price v. Likens*, 23 Tex. 635, 637. In *Burnett v. State*, 14 Tex. 455, it is held that the *nunc pro tunc* entry may be made if it appear to the satisfaction of the court that an order was made at a former term and omitted to be entered by the court or clerk.

¹⁴ *Weed v. Weed*, 25 Conn. 337, Waite, J., holding that "whether there was a mistake in the record was a question of fact for the court below, to be established as any other fact in a court of justice, by proper evidence": p. 344.

¹⁵ *Jones v. Field*, 80 Iowa, 281, 286.

¹⁶ *Waters v. Engle*, 53 Md. 179, 182, on the ground that in such case the court exercises a *quasi* equitable power, according to the facts and circumstances of the case; *Kemp v. Cook*, 18 Md. 130, 138.

¹⁷ *Fay v. Wenzell*, 8 Cush. 315, 317. But see *Sayles v. Briggs*, 4 Met. (Mass.) 421, 424, holding that the want of a judicial record cannot be supplied by parol evidence, and *Kendall v. Powers*, 4 Met. (Mass.) 553, 555, to same effect.

¹⁸ *Frink v. Frink*, 43 N. H. 508, 515.

¹⁹ *Bank of Newburgh v. Seymour*, 14 Johns. 219; *Marsh v. Berry*, 7 Cow. 344, 348.

²⁰ *Wade v. Odeneal*, 3 Dev. L. 423, 424; *Reid v. Kelly*, 1 Dev. L. 313, 315; *Philippe v. Higdon*, Busb. L. 380; *Mayo v. Whitson*, 2 Jones L. 231, 235.

²¹ *Hollister v. District Court*, 8 Oh. St. 201, 203. But in *Ludlow v. Johnson*, 3 Ohio, 553, it was held that an order *nunc pro tunc* cannot be founded upon mere parol proof of what was ordered to be done at a previous term: p. 575 *et seq.*

²² *Wyman v. Buckstaff*, 24 Wis. 477.

The correction of the record must be drawn with the view of protecting the rights of third parties acquired by virtue of the [* 337] *original entry and before the correction thereof,¹ and after notice to the parties to be affected by it.² But where the amendment is merely as to form, or to complete a ministerial act, notice to the other side does not seem to be necessary.³ It is held that where a judgment is stricken out during the term at which it was rendered, such action is not the subject of appeal;⁴ but where it is done after the lapse of the term, an appeal lies.⁵

Must be made upon notice and so as to protect third parties.

§ 148. **Proceeding in Rem and in Personam.**—The expression is often used, in asserting for the judgments of probate courts a validity not claimed for them in respect of judgments *in personam*, that from the nature of the jurisdiction exercised by them they proceed *in rem*. The judgment, being *in rem*, it is said is conclusive upon all the world, and hence all persons whatever have a right to be heard in the proceeding.⁶ Even parties not *in esse* at the time of the judgment have been held to be concluded.⁷ A distinguished jurist says, "That only is a proceeding *in rem* in which the process is to be served on the thing itself, and the mere possession of the thing itself, by the service of the process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever."⁸ To constitute a probate pro-

What are proceedings *in rem*.

¹ McCormick v. Wheeler, 36 Ill. 114; Hunt v. Grant, 19 Wend. 90; and see Freem. on Judgm., § 66, for further authorities. It is no objection, however, that a suit between the parties to the original record be thereby defeated: Colby v. Moody, 19 Me. 111.

² Poole v. McLeod, 1 Sm. & M. 391; Cobb v. Wood, 1 Hawk. 95; Wheeler v. Goffe, 24 Tex. 660; Lovejoy v. Irelan, 19 Md. 56. In Alabama it is held that no notice is necessary to the opposite party: Allen v. Bradford, 3 Ala. 281, 282, citing earlier cases. So where the application is made when all parties are present in court, in another proceeding, no formal notice is necessary: Leavey's Estate, 82 Iowa, 440.

³ Hagler v. Mercer, 6 Fla. 721; Allen v. Bradford, *supra*; Nabers v. Meredith, 67 Ala. 333.

⁴ Rutherford v. Pope, 15 Md. 579, 581.

⁵ Graff v. Transportation Company, 18 Md. 364, 370; Craig v. Wroth, 47 Md. 281.

⁶ Lowber v. Beauchamp, 2 Harr. 139; William Hill Co. v. Lawler, 116 Cal. 559;

State v. Central Pacific R. R. Co., 10 Nev. 47, 80; Grignon v. Astor, 2 How. (U. S.) 319; Day v. Micou, 18 Wall. 156, 162 (*per* Strong, J.); Broderick's Will, 21 Wall. 503, 509, 519; Dickey v. Vann, 81 Ala. 425; Ryan v. Ferguson, 3 Wash. 356; Lyons v. Hamner, 84 Ala. 197, 202; and see remarks of Lotz, J., dissenting, in Barnett v. Vanmeter, 7 Ind. App. 45, 56; Burris v. Kennedy, 108 Cal. 331. Proceedings to set out the widow's homestead, in the probate court, are *in rem*; and personal notice not jurisdictional: *ante*, § 103; so the grant of letters is a proceeding *in rem*: *post*, § 263; the probate of a will: *post*, § 227, p. *500; and distribution on final settlement: *post*, § 561, p. *1230.

⁷ Ladd v. Weiskopf, 62 Minn. 29 (on an order of distribution in the probate court).

⁸ Drake on Attachments, § 5. The author adopts the language of Chief Justice Marshall in Mankin v. Chandler, 2 Brock. 125, 127, and also cites Megee v. Beirne, 39 Pa. St. 50, and Bray v. McClury, 55 Mo. 128.

ceeding a proceeding *in rem*, says Mr. Waples in his recent work on Proceedings in Rem, it "must possess all the characteristics and embrace all the requisites of that form of action."¹ It fol-

Custody of the *res* necessary. lows, that possession of the * thing (custody of [* 338] the *res*) is one of the essential conditions of jurisdiction over the thing. Every other requisite may be conceded; and if executors and administrators be looked upon as officers of the court, so that possession by them may be considered possession by the court,² the disposition of personal property by order or judgment of the probate court is clearly a proceeding *in rem*. The law vests title to all personal property of a decedent in his executor or administrator, and requires the latter to notify "all the world," by publication, of his assumption of the office, — a proceeding constituting the notice, monition, or proclamation required to obtain jurisdiction *in rem*. The same principle is applicable to real estate, where, as is the case in a number of States, it passes to the personal representative.³

¹ "There must be a *res*, custody of the *res*, right to proceed against it, a competent forum, allegations equivalent to an information, notice to all interested, a hearing, a finding of facts, an order, judgment, or decree, a sale, and a confirmation or homologation, before the 'new title paramount' can be evolved from probate proceedings": Waples, Proc. in Rem, § 563.

² Says Brewer, J., in delivering the opinion of the United States Supreme Court in *Byers v. McAuley*, 149 U. S. 608, 615: "An administrator appointed by a State court is an officer of that court; his possession of the decedent's property is a possession taken in obedience to the orders of that court; it is the possession of the court, and cannot be disturbed by any other court."

³ See *post*, § 337, enumerating these States. "The probate court," says Cauty, J., in deciding on the validity of a decree of distribution involving title to real estate in Minnesota, in which State realty goes to the executor or administrator on the death of its owner, "not only exercises the jurisdiction formerly exercised by the courts of common law and equity over the real estate of deceased persons, but it also exercises a jurisdiction over such real estate never exercised by those courts. The jurisdiction of the courts of common law and equity over such real estate was exercised by proceedings *in*

personam. This was wholly inadequate to a complete and proper administration of such real estate. The legislature deemed it proper that the whole world should be bound by the administration proceedings, and to accomplish this provided a proceeding *in rem*. This proceeding is not according to the course of the common-law, and is not a mere substitute for any proceeding known to the common law in the administration of such real estate, but its scope and purpose are wholly different. The change from the proceeding *in personam* to one *in rem* is not a mere evasion of the constitutional rights of parties who would be entitled to personal notice under the old form of procedure. On the contrary, the legislature have a right to say that when the owner dies the court shall seize his property, and by constructive notice compel all claimants to appear or be barred. It is a case where it is proper for the court to seize the *rem*, and by constructive notice make the whole world parties. Where all the world are in fact proper or necessary parties, the doctrine of due process of law does not prevent the legislature from adopting a more appropriate, adequate, and complete remedy than that known to the common law": *McNamara v. Casserly*, 61 Minn. 335, 343. But this case holds that where the proceedings in the probate court have once "ceased to be *in fieri*, or pending for any purpose," the right to personal notice to

But the title to real property vests, in most States, not in the executor or administrator, but in the devisee or heir. Hence, in all of these States, the essential requisite of jurisdiction *in rem*, possession, the custody of the *res*, is wanting in respect of real estate. Mr. Waples, in the work referred to, strongly emphasizes, that, if the estate be in the adverse possession of another, the administrator must first gain possession before the probate court can take jurisdiction over it.¹ It is provided in most States that notice must be given to the heirs, or others interested in real estate, either by personal service or publication, before real estate can be subjected to the satisfaction of debts of the decedent.² When such notice has been given, the importance of the distinction between proceeding *in rem* and *in personam* disappears: if the notice was by actual service on the parties, they are parties to the record, and as such bound by the judgment of the court; if by publication, then the analogy to the proceeding *in rem* is complete; the title of the administrator is thereby extended over the real estate, and displaces that of the heir or devisee for the purposes pointed out by the law. The judgment affects neither the person nor any other property of the heirs or devisees save that described in the notice published,³ which may then be said to be in the custody of the law.⁴ But if no notice was given to parties in interest, and the administrator was not in possession of the land, under the law of the State, then the proceeding is necessarily void, being neither *in rem* nor *in personam*.⁵

[* 339] * It is hardly necessary to repeat that the jurisdiction exercised by probate courts in adjudicating upon the rights of litigating parties, is, so far as such parties are present in court or represented by counsel, strictly followed by all the consequences attendant upon adjudications *in personam*, to the extent of the subject-matter over which the court has power.

§ 149. **Method of Procedure in Probate Courts.**—Although probate courts are mostly, if not universally, courts of record,⁶ having a seal, a clerk or authority to act as their own clerk, and executive officers, yet their procedure is, generally, summary, requiring no pleading in the technical sense, nor adherence to artificial rules in the statement of the cause of action or

resident heirs before their right, once adjudicated, could be affected, was constitutional, and no new proceeding *in rem* could be resorted to, to overthrow a decree valid on its face (holding notice by publication insufficient as to resident heirs).

¹ Waples Proc. *in rem*, § 565. But see, as to the American law on this subject, *post*, § 471, p. * 1044 *et seq.*

² See *post*, § 466, on the subject of the sale of real estate.

³ McPherson v. Cunliff, 11 S. & R. 422, 430.

⁴ Doe v. Hardy, 52 Ala. 291, 295.

⁵ And the record should show such notice: Waples, Proc. *in rem*, § 569, citing numerous authorities to show that without notice to the heirs a sale of their real estate by order of the probate court is void.

⁶ *Ante*, § 144.

Proceedings
in probate
courts are
summary.

Statement of a subsisting right is sufficient to let in all necessary proof to sustain it; appearance of defendant sufficient traverse.

defence. An intelligible statement of an existing substantial right, which the court has jurisdiction to enforce, is a sufficient allegation of all matters necessary to sustain a judgment; and the simple appearance of the defendant usually entitles him to rebut the proof offered by the other side, or prove any matter in defence; save, perhaps, a cause of action constituting a set-off or counter claim, of which the other side must have sufficient notice

to enable it to prepare any defence it may have to the same. "The practice in county courts is purposely so framed that parties can attend to their own business in ordinary matters, and the decision should be so rendered as to subserve the ends of justice according to the evidence, without regard to technical precision in pleading."¹ In Rhode Island a statute requiring applications to the probate court to be made in writing was held directory * merely; [* 340]

Parties may appear in person, or by counsel or agent.

but it was further held that the facts constituting the cause of action must in some manner appear of record.² It has already been stated, that a party may appear by attorney (or agent), or in person.³

It lies in the nature of these courts, that in the exercise of their jurisdiction they are not confined to legal principles or the rules of common-law courts, but exercise equitable powers as well. Whenever, within the scope of the statutory jurisdiction confided to them, the relief to be administered, the right to be enforced, or the defence to an action properly pending before them, involves the application of equitable principles, or a proceeding in accordance with the practice in chancery, their powers are commensurate with the necessity demanding their exercise, whether legal or equitable in their nature.⁴

Not confined to legal or equitable, but exercise all powers necessary to accomplish the statutory functions.

¹ *Per* Wagner, J., in *Sublett v. Nelson*, 38 Mo. 487, 488. "The law has pointed out and adopted a summary mode of proceeding for the convenience of the people," continues the judge, "and to apply the doctrine of variance with the strictness here contended for would make it a snare to entrap the unwary." To the same effect, *Flinn v. Shackelford*, 42 Ala. 202, 207: "The Orphan's Court is a court of equity, and looks only to the justice of the demand, and not to the form in which it is presented." If "the decree reaches the real justice of the case," it will be affirmed: *Stockton's Appeal*, 64 Pa. St. 58, 63; *Watkins v. Donnelly*, 88 Mo. 322; *McManus v. McDowell*, *per* Thompson, J., 11 Mo. App. 436, 444; *Noble v. McGinnis*, 55 Ind. 528, 532; *Ramsey v. Fouts*, 67

Ind. 78, 80; *Brook v. Chappell*, 34 Wis. 405, 419; *Comstock v. Smith*, 26 Mich. 306, 322; *Anderson v. Gregg*, 44 Miss. 170, 176, citing numerous Mississippi cases; *Steph. Dig. of Ev. 4*; *Windell v. Hudson*, 102 Ind. 521; *Culvert v. Yundt*, 112 Ind. 401; *Titus v. Poole*, 145 N. Y. 414; *Hayner v. Trott*, 46 Kans. 70. The Statute of Limitations may be relied on without being specially pleaded as a defence: *Bromwell v. Bromwell*, 139 Ill. 424, 428. So oral exceptions to final settlements may be heard: *Clark v. Bettelheim*, 144 Mo. 258, 274.

² *Robbins v. Tafft*, 12 R. I. 67.

³ *Ante*, § 144.

⁴ *Shepard v. Speer*, 140 Ill. 238, 245; *Guier v. Kelly*, 2 Binn. 294, 299; *Dundas's Appeal*, 73 Pa. St. 474, 477, 479;

But they possess these powers only in so far as they have been conferred by statute, or are indispensable to the exercise of such as have been conferred.¹ They have no original chancery powers, such as to enforce a vendor's lien,² no ancillary jurisdiction in aid of common-law courts, no power to follow a trust fund through various transformations,³ nor over any purely equitable right.⁴ Even where the chancery court itself [* 341] has probate jurisdiction, it will proceed in probate * matters not according to the strict and technical practice resorted to in chancery, but according to the summary method which is prescribed for probate courts.⁵ The resemblance of probate courts to courts of chancery consists in their practice of proceeding by petition and answer, containing the substance, but not the nice distinctions, of a bill in equity.⁶

Although the right of trial by jury is secured in most States to claimants seeking to establish their claims in probate courts,⁷ yet

Williamson's Appeal, 94 Pa. St. 231, 236; *In re Moore*, 96 Cal. 522, 529; *In re Clos*, 110 Cal. 494, 501; *Johnston v. Shofner*, 23 Ore. 111, 118; *Powell v. North*, 3 Ind. 392; *Dehart v. Dehart*, 15 Ind. 167; *Hurd v. Slaten*, 43 Ill. 348; *Millard v. Harris*, 119 Ill. 185, 198; *Hales v. Holland*, 92 Ill. 494, 498; *Donovan's Appeal*, 41 Conn. 551; *Potter's Appeal*, 56 Conn. 1, 16; *Blanton v. King*, 2 How. (Miss.) 856; *Titterton v. Hooker*, 58 Mo. 593; *In re Niles*, 113 N. Y. 547, 556; *Green v. Saulsbury*, 6 Del. Ch. 371; *Maginn v. Green*, 67 Mo. App. 616; *Hyland v. Baxter*, 98 N. Y. 610, 616; *Ritch v. Bellamy*, holding that where a surrogate or probate power is at the same time a chancery power, the jurisdiction is concurrent in the two courts: 14 Fla. 537, 542; *Shoemaker v. Brown*, to same effect: 10 Kans. 383, 390. In Pennsylvania the Orphan's Court has power to order property of an estate unlawfully in the hands of another to be surrendered for administration, where the title is undisputed: *Odd Fellows Savings Bank's Appeal*, 123 Pa. St. 356. So far as the jurisdiction to try claims depends on the equitable nature of the claim, this subject is discussed under § 392, treating of what demands and defences are triable in probate courts.

¹ *Post*, § 392; *Pearce v. Calhoun*, 59 Mo. 271; *Bernheimer v. Calhoun*, 44 Miss. 426, 429; *Sanders v. Soutter*, 126 N. Y. 193, 200.

² *Ross v. Julian*, 70 Mo. 209, 212;

West v. Thornburgh, 6 Blackf. 542, 544, or set aside a deed: *Estate of Dunn*, Myr. 122, 123.

³ *Butler v. Lawson*, 72 Mo. 227, 245; *Wombles v. Young*, 62 Mo. App. 115.

⁴ *Davis v. Smith*, 75 Mo. 219, 227; *Willard's Appeal*, 65 Pa. St. 265, 267; *Wiley's Appeal*, 84 Pa. St. 270; *Stilwell v. Carpenter*, 59 N. Y. 414, 425; *Presbyterian Church v. McElhinney*, 61 Mo. 540, 543; *Gilliland v. Sellers*, 2 Oh. St. 223, 228; *Caldwell v. Caldwell*, 45 Oh. St. 512, 521; *McCaulley v. McCaulley*, 7 Houst. 102; *Vail's Appeal*, 37 Conn. 185, 195; *Mann v. Mann*, 53 Vt. 48, 55; *Leonard v. Leonard*, 67 Vt. 318; *Hewitt's Appeal*, 53 Conn. 24; *Sherman v. Lanier*, 39 N. J. Eq. 249, 258. See *post*, § 392.

⁵ *Wells v. Smith*, 44 Miss. 296, 304; *Sharp v. Sharp*, 76 Ala. 312, 317.

⁶ "By which, however, justice is obtained more conveniently and as certainly as in courts of equity, purely so called": *Brinker v. Brinker*, *supra*; *Simmons v. Henderson*, Freem. Ch. 493, 497; *Satterwhite v. Littlefield*, 13 Sm. & M. 302, 307.

⁷ It is held that there can be no trial by jury in the absence of a statutory provision to that effect. *Bradley v. Woerner*, 46 Mo. App. 371; *Martin v. Martin*, 74 Ill. App. 215, 219. See also *Duffield v. Walden*, 102 Iowa, 676, 679 (holding that a jury trial in probate proceeding is not a matter of right).

No power to instruct a jury or set aside a verdict.

the power, inherent in courts proceeding according to the principles of the common law, to instruct the jury and to direct or set aside a verdict and grant a new trial, does not exist in probate courts unless affirmatively

granted by statute.¹

But the origin of our probate system, referable to the English spiritual courts, is still recognizable in the decisions of some States

Procedure traceable to civil and canon law.

as to their mode of procedure, although the rules of the civil and common law which governed the ecclesiastical courts are necessarily greatly modified in the adaptation

to the widely different circumstances and spirit of the American people. So it has been held in Maine, that the probate court "does not derive its mode of proceeding from the common law, but the statute has conferred upon it the powers of ecclesiastical courts, and prescribed the modes of proceeding borrowed from these courts and the courts of chancery."² In New Jersey they are said to partake of the

powers of a chancery and prerogative court instituted by law;³ in Mississippi⁴ and Georgia,⁵ the civil and canon law, as it governed the proceedings of the ecclesiastical courts of England in testamentary causes, is the law of the courts of ordinary on similar questions; and in South Carolina their statutory organization is said to constitute them civil, in contradistinction to ecclesiastical courts.⁶ In

Powers not exclusively referable to statutes.

New Hampshire courts of probate "have a very extensive jurisdiction not conferred by statute, but by a general reference to the law of the land, that is, to that

branch of the common law known and acted upon for ages, *the probate or ecclesiastical law."⁷ And in California the [* 342] superior court is by the constitution invested with jurisdiction over probate matters as a part of its general jurisdiction, the same as its common-law and equity powers, and is not therefore a statutory tribunal, although controlled in the mode of its action by the code.⁸

Rules of evidence same as in other courts.

But the rules of evidence and of property are equally binding upon probate and common-law courts.⁹

¹ "As a general thing," says Bliss, J., in *Bartling v. Jamison*, 44 Mo. 141, 144, "the probate and county courts are composed of men unlearned in the law and incompetent to pass upon the various considerations laid down in the books as grounds for a new trial." He quotes from an old New York case the opinion of Justice Kent, emphatically holding that inferior courts "are not intrusted by the law with the power of setting aside verdicts of juries upon the merits."

² *Withee v. Rowe*, 45 Me. 571, 580.

³ *Wood v. Tallman*, 1 N. J. L. 153, 155.

⁴ *Cowden v. Dobyns*, 5 Sm. & M. 82, 90.

⁵ *Finch v. Finch*, 14 Ga. 362.

⁶ *Lide v. Lide*, 2 Brev. 403.

⁷ *Per Bell, C. J.*, in *Morgan v. Dodge*, 44 N. H. 255, 258; see remarks of *Perley, C. J.*, in *Hayes v. Hayes*, 48 N. H. 219, 226.

⁸ *Burris v. Kennedy*, 108 Cal. 331, 337; *Heydenfeldt v. Super. Ct.*, 117 Cal. 348.

⁹ *Eveleth v. Crouch*, 15 Mass. 307. As to the right of parties to testify in their own behalf, see *post*, § 398, pp. *829 *et seq.*; and as to evidence in proving claims in probate courts, see *post*, § 396.

It is self-evident that the jurisdiction conferred upon a court, as such, can be exercised only by the court when sitting in term time, and not by the judge in vacation. Hence a judgment rendered by the judge after the adjournment of the term is *coram non judice*, and void.¹ And so is a judgment rendered against a party without notice to him.² Mere verbal orders, or *ex parte* proceedings not of record, are not valid, and therefore afford no protection to an administrator in a subsequent proceeding.³

Court only when in term; judge in vacation has not the power of the court.

Judgment without notice, verbal orders, etc., void.

Probate courts, however, have the incidental power to adjourn;⁴ and when, for unavoidable reasons, the court cannot be held at the county seat, its proceedings are not void if held elsewhere;⁵ and it will be presumed that the house in which the court is held is the court-house.⁶

Have power to adjourn.

The method and procedure in proving claims against the estates of deceased persons in probate courts is a subject elsewhere treated.⁷

¹ But *semble* such a judgment may be declared void, and the cause proceeded with from the last previous continuance: *Moore v. Maguire*, 26 Ala. 461, 464; the judge has no power to hold a court at any other time or place than those fixed by law, and any decree passed in such case will be void: *White v. Riggs*, 27 Me. 114, 117; a court of probate cannot in vacation compel an administrator to appear before it and give additional security upon the bond: *Wingate v. Wallis*, 5 Sm. & M. 249, 253; nor allow a claim: *Dingle v. Pollock*, 49 Mo. App. 479; nor remove an administrator at a special term to which the cause was not adjourned: *Boynton v. Nelson*, 46 Ala. 501, 509. But it was held that during term time the court may adjourn for the day, and then reconvene court; and the appointment of

an administrator then made will not be vitiated on that account: *Bowen v. Stewart*, 128 Ind. 507.

² *Wood v. Myrick*, 16 Minn. 494, 502; *Wells v. Smith*, 44 Miss. 296, 302; *Gardner v. Gardner*, 42 Ala. 161.

³ *Scott v. Fox*, 14 Md. 388, 394, citing: *Carlyle v. Carlyle*, 10 Md. 440; *Shine v. Redwine*, 30 Ga. 780, 794. Writing the word "vacated" across the order of adjournment has been held a sufficient method of setting aside the order: *Cole Co. v. Dallmeyer*, 101 Mo. 57, 66.

⁴ *Kimball v. Fisk*, 39 N. H. 110, 122.

⁵ *Sevier v. Teal*, 16 Tex. 371, 373. But it must be in the county: *Capper v. Sibley*, 65 Iowa, 754.

⁶ *Shull v. Kennon*, 12 Ind. 34, 36; *Kimball v. Fisk*, *supra*.

⁷ *Post*, §§ 386-412.

* CHAPTER XVI.

[* 343]

OF THE SUBJECT-MATTER WITHIN THE JURISDICTION OF PROBATE COURTS.

§ 150. **Scope of the Jurisdiction.**—Logically, the jurisdiction of probate courts should extend to all matters necessarily involved in the disposition of the estates of deceased persons, from the time of the owner's death until the property has been placed in the possession of those to whom it devolves. We have seen that the English testamentary courts never possessed more than a comparatively small proportion of this power;¹ and it is equally true that in no one of the American States is the whole of it vested in probate courts. Some of the elements of power necessary to the practical realization of the rights of creditors, heirs, legatees, distributees, devisees, and of the husband, widow, and minor children, are found wanting in the statutory grant of powers to these courts in each State, which therefore necessarily lodge in other courts.² But the powers so withheld are not the same in all the States; those denied in some are granted in others; so that, while no one probate court possesses them all, yet the full scope of jurisdiction strictly subsumable under the principle which conditions this class of courts will be found in the aggregate of powers conferred upon them in the several States.³

It would involve unprofitable labor to enumerate in this place the powers directly conferred by statute, which may be readily found in the enactments of the several States conferring the powers. But it should be mentioned that as to the incidental powers there is considerable divergence in the different States, resulting from the different views taken by the courts upon the extent to which implied powers are involved in the powers granted. The State of New York (under the Rev. St., 1830, before the amendment of 1837⁴), in which all powers of the surrogates were limited to such as were expressly conferred by statute, and that of Pennsylvania, in which very extensive powers are held to reside in the Orphan's Court by necessary implication, may be looked upon as

¹ *Ante*, § 139.³ 3 South. L. Rev. (N. S.) 264.² *Bush v. Lindsey*, 44 Cal. 121, 125;⁴ See *ante*, § 142, p. * 323, note.*ante*, § 142.

marking the two extremes in this respect, the other States taking intermediate grounds. It is said, in Pennsylvania, that the Orphan's Court alone has authority to ascertain the amount of a decedent's property, and order its distribution among those entitled to it;¹ that among those entitled to distribution are included creditors, next of kin, legatees, and other persons interested in the estate;² that "within its appointed orbit" the jurisdiction of the Orphan's Court "is exclusive, and therefore necessarily as coextensive as the demands of justice,"³ having ample power to inquire into all questions standing directly in the way of a distribution to the parties in interest;⁴ and upon the principles of equity may dispose of every question that arises in the determination of matters within its jurisdiction.⁵

§ 151. **Jurisdiction as limited to the Devolution of Property on the Owner's Death.** — Since the functions of probate courts are limited, in respect of executors and administrators, to the control of the devolution of property upon the death of its owner, it is not their province to adjudicate upon collateral questions. The right or title of the decedent to property claimed by the executor or administrator against third persons, or by third persons against him, as well as claims of third persons against creditors, heirs, legatees, devisees, or distributees, must, if an adjudication become necessary, be tried in courts of general jurisdiction, unless such jurisdiction be expressly conferred on probate courts.⁶

Jurisdiction limited to property questions arising out of its devolution on its owner's death.

Unless further powers are granted by statute.

It follows from this principle, that probate [* 345] * courts have no power to investigate the validity

of an assignment of the interest of an heir or legatee; the decree of distribution or payment should be to the legal successor of the property, leaving questions of disputed rights between these and claimants against them to be adjudicated in the ordinary courts.⁷ And this is so of the

No jurisdiction to try disputed assignments.

¹ *Per Black, C. J.*, in *Whiteside v. Whiteside*, 20 Pa. St. 473, 474.

² *Per Lewis, J.*, in *Kittera's Estate*, 17 Pa. St. 416, 422 *et seq.*; *Black v. Black*, 34 Pa. St. 354, 356; *Ashford v. Ewing*, 25 Pa. St. 213, 215; *Linsenbigler v. Gourley*, 56 Pa. St. 166, 172; *Watts' Estate*, 158 Pa. St. 1 (two of the judges dissenting on the extraordinary powers assumed to exist in the Orphan's Court in this case).

³ *Shollenberger's Appeal*, 21 Pa. St. 337, 341; *Ashford v. Ewing*, *supra*, citing *Downer v. Downer*, 9 Watts, 60, and other Pennsylvania cases.

⁴ *Dundas' Appeal*, 73 Pa. St. 474, 479; *Williamson's Appeal*, 94 Pa. St. 231, 236; *Lex's Appeal*, 97 Pa. St. 289, 292.

⁵ *Miskimins' Appeal*, 114 Pa. St. 530, 533.

⁶ *Stuart's Estate*, 67 Mo. App. 61, 64; *Hoehn v. Struttman*, 71 Mo. App. 399, 405; *Theller v. Such*, 57 Cal. 447, 459; *In re Haas*, 97 Cal. 232; *Shumway v. Cooper*, 16 Barb. 556, 559; *Larue v. Van Horn*, 25 La. An. 445; *Homer's Appeal*, 35 Conn. 113, 114; *Dunn's Estate*, Myr. 122; *Gordon v. Goulé*, 30 La. An. 138; *Proctor v. Atkins*, 1 Mass. 321; *Robinson's Estate*, 12 Phila. 170; *Edwards v. Mounts*, 61 Tex. 398; *Wise v. O'Malley*, 60 Tex. 588; *Mousseau v. Mousseau*, 40 Minn. 236, 239; *Walker's Will*, 136 N. Y. 20, 28; *Daugherty v. Daugherty*, 82 Md. 229.

⁷ *Johnson v. Jones*, 47 Mo. App. 237,

assignments of creditors,¹ of legatees,² of distributees,³ of parties entitled to partition,⁴ of the assignment by a widow of her interest in the estate,⁵ and of a legacy charged upon another legacy.⁶ But it must not be inferred from this that the probate

But may decree distribution or payment to an assignee with the assignor's consent.

court has no authority to decree payment to an assignee whose right is not disputed,⁷ or where the distributee is estopped by a release;⁸ for the decree in favor of an assignee, assented to by the assignor, is of the same effect as a decree in favor of the assignor.⁹

And such power may be conferred upon the probate court by statute.¹⁰ So, too, an executor or administrator, who wrongfully collects rents from real estate of which the title and right of

No power over property wrongfully taken by the administrator.

possession is in the heirs or devisees, is not accountable for such rents to the probate court, because he does not hold the rents so collected as a representative of the estate, but as one who has trespassed upon the rights of others, who may call him to account in a court of ordinary

jurisdiction.¹¹ And the same is *true of personal property [* 346] seized or claimed by the executor or administrator as a part

Nor over questions of title paramount to that of the decedent.

of the estate, and claimed by others.¹² Where the statute confers exclusive jurisdiction upon courts of probate to obtain and regulate the partition of successions,¹³ the

241; *Wood v. Stone*, 39 N. H. 572; *Hill v. Hardy*, 34 Miss. 289, 291; *Decker v. Morton*, 1 Redf. 477, 484; *Portevant v. Neylans*, 38 Miss. 104; *Knowlton v. Johnson*, 46 Me. 489; *Holcomb v. Sherwood*, 29 Conn. 418; *Harrington v. La Rocque*, 13 Or. 344; *Farnham v. Thompson*, 34 Minn. 330, 336; *Hewitt's Appeal*, 53 Conn. 24; *Matter of Randall*, 152 N. Y. 508 (holding that in case of dispute the court could order payment to neither party until adjudicated in a court of equity); *Cheever v. Ching*, 82 Cal. 68.

¹ *Post*, § 412, p. * 867.

² *Post*, § 461, p. * 1015.

³ *Post*, § 563, p. * 1235.

⁴ *Post*, § 567, p. * 1245.

⁵ *Woodruff v. Woodruff*, 3 Dem. 505, 508; as in case of dower: *Hewitt's Appeal*, 53 Conn. 24, 37. And so of the release or assignment of the widow's statutory provision or year's support: *Cauley v. Truitt*, 63 Mo. App. 356.

⁶ *Ditsche's Estate*, 13 Phila. 288; *Brittin v. Phillips*, 1 Dem. 57, 60. See *post*, § 155, p. * 352. In Pennsylvania, however, the Orphan's Court has exclusive jurisdiction in cases of legacies charged on real estate: *Brotzman's Appeal*, 119 Pa. St.

645, 655. And see further on this and other questions relating to the charging of legacies on real estate and the manner and forum of enforcing them, *post*, § 491, p. * 1099.

⁷ If an assignee of a legatee submit his claim to the decision of the probate court, such decision, if not appealed from, is binding: *Otterson v. Gallagher*, 88 Pa. St. 355, 358.

⁸ *Tillson v. Small*, 80 Me. 90.

⁹ *Ordinary v. Matthews*, 7 Rich. L. 26, 30; *Vanhorn v. Walker*, 27 Mo. App. 78. As to the rights of assignees, see *post*, § 563, and authorities.

¹⁰ See *Re Phillips*, 71 Cal. 285, where it is assumed that the power is vested in the court having probate jurisdiction; and *In re Burton*, 93 Cal. 459.

¹¹ *Calyer v. Calyer*, 4 Redf. 305. See *post*, § 513.

¹² *Marston v. Paulding*, 10 Pai. 40; *Merrick's Estate*, 8 Watts & S. 402; *Wadsworth v. Chick*, 55 Tex. 241; *Calyer v. Calyer*, *supra*.

¹³ The subject of partition of real estate in probate courts is discussed hereafter, § 567, p. * 1243.

grant of power is held to apply only to cases "where the thing to be partitioned is one entire succession and the parties hold by the same title as heirs;"¹ if, therefore, the property to be divided be owned in part by heirs, and in part by a distinct and independent title, the probate court is without jurisdiction.² So the probate court has no jurisdiction of questions between trustee and beneficiary, or to compel an accounting between a testamentary trustee and the *cestui que trust*;³ but power in the executor to sell land, and to dispose of the property of the estate as to the executor shall seem best, "and without responsibility," does not create a trust in the sense of depriving the probate court of its jurisdiction to compel the executor to account for waste of such estate.⁴ The jurisdiction of the probate court ceases, when an executor, who is also trustee, has made his final settlement; a court of equity alone can enforce the testamentary trusts;⁵ but until distribution he holds as executor, and not as trustee, and equity has no jurisdiction.⁶ So if a testamentary trustee is required by the statute to account periodically to the probate court, it has jurisdiction to determine whether the trustee has accounted in full to the beneficiaries for the whole of the income of the trust fund.⁷ The statute of Vermont is held to give to the probate court "general equity powers" in regard to trusts and trust funds that arise in the settlement of estates;⁸ but the court further holds that the probate court has not general equity jurisdiction, and being of limited jurisdiction in this respect must proceed in accordance with the statute conferring jurisdiction.⁹ In like manner, where the statute confers power on the probate court to order payment of claims against the estate which

Nor between
testamentary
trustee and the
cestui que trust.

¹ Henry v. Keays, 12 La. 214, 219; Buddecke v. Buddecke, 31 La. An. 572, 574; State v. Parker, 9 N. J. L. 242, 243; McBride's Appeal, 72 Pa. St. 480, 484.

² Buddecke v. Buddecke, *supra*; Richardson v. Loupe, 80 Cal. 490; Buckley v. Superior Court, 102 Cal. 6. But *aliter* if the statute determines the question of jurisdiction: Brown's Appeal, 84 Pa. St. 457, 458.

³ Poole v. Brown, 12 S. C. 556, 558; Haverstick v. Trudel, 51 Cal. 431, 433; Billingsly v. Harris, 17 Ala. 214; McBride v. McIntyre, 91 Mich. 406; Smith v. Smith, 15 Wash. 239; Strong v. Strong, 8 Conn. 408 (the statute requiring the appointment of distributors in this State); Jasper v. Jasper, 17 Oreg. 590 (Strahan, J., dissenting from this view on the ground that under the statute the jurisdiction of the county court was coextensive with the trust imposed); the probate court cannot de-

clare a trust and enforce it by decree: Matter of Monroe, 142 N. Y. 484.

⁴ Auguisola v. Arnaz, 51 Cal. 435, 438. So where a trust is imposed upon the executrix as such, the Orphan's Court has sole jurisdiction of such trust: Erie Savings Co. v. Vincent, 105 Pa. St. 315, 322. And see Harland v. Person, 93 Ala. 273.

⁵ Blumenthal v. Moitz, 76 Md. 564; McLane v. Cropper, 5 Dist. Col. App. 276; as to jurisdiction of the surrogate over testamentary trusts in New York, see Matter of Hawley, 104 N. Y. 250, 262 *et seq.*; Rudd v. Rudd, 4 Dem. 335.

⁶ Dougherty v. Bartlett, 100 Cal. 496; Creamer v. Holbrook, 99 Ala. 52; Foss v. Sowles, 62 Vt. 221.

⁷ New England Trust Co. v. Eaton, 140 Mass. 532.

⁸ Foss v. Sowles, 62 Vt. 221, 224, citing §§ 2284-2300 R. L.

⁹ Foss v. Sowles, *supra*.

are not disputed by the administrator, there is no power to order the payment of disputed claims¹ or legacies,² nor of claims acquired by subrogation.³ So as to homesteads of widows, if their right is disputed.⁴ And jurisdiction "in all matters relating to the allotment of dower" * does not confer jurisdiction over a [* 347] stranger claiming adversely to the husband under an execution sale;⁵ nor does the power conferred upon probate courts to subpoena and examine parties alleged to conceal or withhold property of the estate authorize such courts to try the title to the property in dispute.⁶ In South Carolina, where the constitution confers jurisdiction upon probate courts, and the power to partition real estate is not expressly conferred, it was held that an act of the legislature conferring the power is unconstitutional, and the want of jurisdiction to decree partition in a probate court may be insisted on in the appellate court, or declared by the court itself, although neither side raised the point in either court.⁷ So the power to try civil and criminal cases conferred upon the probate court by a territorial legislature has been held inconsistent with the act of Congress under which the Territory is organized, and which conferred upon the supreme and district courts general jurisdiction at common law and in chancery;⁸ and where the jurisdiction of district courts "extends over all civil causes where the amount in dispute exceeds fifty dollars," the probate court was held to be without jurisdiction to try charges of maladministration and spoliation against the administrator.⁹

§ 152. **Liabilities arising from the Administration.**— Upon the same principle, probate courts have no jurisdiction to decree payment to persons employed by the executor or administrator to render services for him, or for the estate, in its administration.¹⁰ Although it may be the duty of the court, in passing upon the administration account, to determine the reasonableness of payments for such ser-

No jurisdiction of demands against the estate arising out of the administration.

¹ *Magee v. Vedder*, 6 Barb. 352, 354.

² *Matter of Hedding Church*, 35 Hun, 313.

³ *Leviness v. Cassebeer*, 3 Redf. 491, 498; *Burton's Estate*, 64 Cal. 428.

⁴ *Lazell v. Lazell*, 8 Allen, 575, 577; *Woodward v. Lincoln*, 9 Allen, 239. And see cases cited *ante*, § 104, p. * 216.

⁵ *Jiggitts v. Bennett*, 31 Miss. 610, 612, citing former Mississippi cases, *Fisher, J.*, dissenting on the ground that the term "allotment" of dower necessarily includes all cases in which an allotment of dower is claimed: p. 614.

⁶ *Dinsmore v. Bressler*, 164 Ill. 211, 221; *Summerfield v. Howie*, 2 Redf. 149; *Gibson v. Cook*, 62 Md. 256, 261; *Smith*

v. Gilmore, 13 Mo. App. 155, 158; *Gardner v. Gillihan*, 20 Oreg. 598. See additional authorities cited, *post*, § 325, p. * 681.

⁷ *Davenport v. Caldwell*, 10 S. C. 317, 347; as to the jurisdiction of probate courts in partition, see *post*, § 567, p. * 1243.

⁸ *Ferris v. Higley*, 20 Wall. 375, 379. See cases cited in *Webster v. Seattle Co.*, 7 Wash. 642, as holding that territorial legislatures cannot confer general law and equity powers on probate courts.

⁹ *Fournique v. Perkins*, 7 How. (U. S.) 160.

¹⁰ See *post*, § 356, and numerous cases cited.

vices, and allow or reject the credits taken therefor, it has not the power, unless expressly granted by statute, to adjudicate upon the claims of such persons against the administrator; their remedy, if he refuse to pay, is in another court.¹ Thus, while the court may

make an allowance to an administrator who performs services [* 348] for the estate, as an attorney at law, not within the scope of his duties as administrator,² in States where the

statute provides for extra compensation aside from the regular commissions,³ or allow him credit for counsel fees properly paid,⁴ it has

no jurisdiction to order the payment of counsel fees by the administrator.⁵ Debts created after the death of the

intestate or testator cannot be proved in the probate court;⁶ nor can the probate court adjust the rights or

equities arising out of the sale of real estate, or out of the vacation of the sale, between the purchaser and administrator;⁷ nor between co-administrators as to the

commissions allowed them in gross, unless the power is conferred by statute;⁸ nor determine the validity of a purchase by an administrator in his own name for the benefit of creditors.⁹ Neither has it power to try a claim against an executor for damages arising out of his acts as such;¹⁰ nor to declare a lien in favor of the administrator on account of money expended by him for the benefit of the estate.¹¹

§ 153. **Adjudication of Claims against the Deceased.** — The power to adjudicate upon claims against deceased persons is in most States conferred upon the courts having control over the administration of their estates, either exclusively, or concurrently with other courts;¹² but unless such power is expressly granted, the probate courts cannot exercise it. Thus it is held in Maryland that authority in the

Nor of debts created after decedent's death.

Nor to adjust the rights of purchasers of real estate sold during the administration.

No power to adjudicate on claims against the deceased unless conferred by statute.

¹ Pike v. Thomas, 62 Ark. 223, 228. See authorities cited, § 356.

² Bates v. Vary, 40 Ala. 421, 441; or order counsel fees to be paid where the statute authorizes the court to direct the payment of expenses of administration: Stokes v. Dale, 1 Dem. 260.

³ On which point, see *post*, § 529. Ordinarily the administrator will not be permitted credit for legal services performed by himself in person, though for the benefit of the estate: *post*, § 515, p. * 1146.

⁴ Pearson v. Darrington, 32 Ala. 227, 273. See *post*, § 515 *et seq.*, as to what counsel fees will be allowed.

⁵ Wright v. Wilkerson, 41 Ala. 267; 273; Townshend v. Brooke, 9 Gill, 90; Hoes v. Halsey, 2 Dem. 577, 579; Barker v. Kunkel, 10 Ill. App. 407, 411; *In re* Levinson, 108 Cal. 450, 458; and see

Henry v. Superior Court, 93 Cal. 569, and cases under § 356, *pro and con*.

⁶ Presbyterian Church v. McElhinney, 61 Mo. 540, 542; Estate of Robinson, 12 Phil. 170; Daingerfield v. Smith, 83 Va. 81, 92; Winston v. Young, 52 Minn. 1, 5. See *post*, § 356, where the subject is fully discussed.

⁷ Eichelberger v. Hawthorne, 33 Md. 588, 596; Young v. Shumate, 3 Sneed, 369, 371; Bond v. Clay, 2 Head, 379; Wolfe v. Lynch, 2 Dem. 610, 616. But see *post*, § 154, where cases are cited showing the exercise of such authority.

⁸ See cases, *post*, § 530, p. * 1170, and § 524, p. * 1162.

⁹ Peters v. Carr, 2 Dem. 22, 29.

¹⁰ Winton's Appeal, 111 Pa. St. 387, 394.

¹¹ Huston v. Becker, 15 Wash. 586.

¹² See *post*, § 391; and as to the effect of such allowance, see § 392.

Orphan's Court to pass such claims, and authorize and approve their payment, does not include the power to ascertain their validity and amount;¹ hence the Orphan's Court has no power, against the protestation of the administrator, to decree the payment of any claim until a court of law shall have definitively pronounced on its validity.² And in New York the delegation of authority to surrogates to decree distribution to claimants "according *to their [*349] respective rights," and "to settle and determine *all* questions concerning any debt, claim, legacy, bequest, or distributive share," is held to give them no power to ascertain what such rights were, and that they are utterly without jurisdiction either to allow or reject any claim whose validity, not having been established in some competent tribunal, is disputed by the executor or administrator.³ Nor has the surrogate jurisdiction to determine whether there has been an accord and satisfaction of a judgment disputed by the administrator, or whether the estate is entitled in equity to a release or discharge.⁴ But the New York statute, which provides for the proving and allowing of an executor's claim against the estate before the surrogate, is held to include claims that are disputed as well as those not disputed, and the circumstance that other persons are jointly interested with him does not affect the surrogate's authority to adjudicate the same, because otherwise the executor would have no means to have his claim allowed.⁵

§ 154. Incidental Powers conferred by Necessary Implication. —

The necessity of recognizing power in the probate courts to carry out the functions expressly pointed out for them, and to accomplish the express purposes for which they are created, has already been mentioned.⁶ Thus the power to compel the executor or administrator to return a correct inventory of the estate, includes the power to determine what property constitutes assets or belongs to the estate, and hence to try the title to property;⁷ authority to direct and control executors and administrators includes the power to approve or disapprove investments made by them as trustees under provisions of a will;⁸ the power to decree distribution or payment of

Powers implied in powers granted.

To ascertain what constitutes assets.

¹ *Bowie v. Ghiselin*, 30 Md. 553, 556.

² *Miller v. Dorsey*, 9 Md. 317, 323.

³ *Greene v. Day*, 1 Dem. 45, 50. The surrogate, on pp. 48 and 49, collects numerous New York decisions, among them *Tucker v. Tucker*, 4 Keyes, 136, the leading case on this point; and quaintly remarks that the statute authorizes the surrogate "to settle and determine such questions, and such questions only, as were not a matter of dispute between the parties, or, in simpler phrase, such questions as there was no question about;"

Lambert v. Craft, 98 N. Y. 342; *Matter of Callahan*, 152 N. Y. 320.

⁴ *McNulty v. Hurd*, 72 N. Y. 518, 521.

⁵ *Shakespeare v. Markham*, 72 N. Y. 400, 407; *Boughton v. Flint*, 74 N. Y. 476, 480. See *post*, § 391.

⁶ *Ante*, § 142, and authorities there cited.

⁷ *McWillie v. Van Vacter*, 35 Miss. 428, 445, citing Mississippi cases.

⁸ *Jones v. Hooper*, 2 Dem. 14. But see *Merritt v. Merritt*, 48 N. J. Eq. 1, 14.

legacies involves the power to try the validity of an alleged gift *mortis causa*; ¹ as well as to determine who is entitled to the funds, and all questions necessary to a proper distribution of the estate.² Jurisdiction * to construe a will, and to ascertain and pass upon the claims of parties asserting rights under or by virtue of it, includes the power of the probate court to adjudicate upon the rights of an executor, as creditor, legatee, or heir, adverse to those whom he represents; ³ under power "to distribute the residue of the estate among the persons who by law are entitled thereto," to determine whether a valid trust has been created by the will,⁴ and what is the trust, who are the trustees and beneficiaries, and to distribute accordingly.⁵ In the exercise of the power to sell succession property the probate court has jurisdiction, as an incident thereto, to enforce the remedies provided by law against a bidder who refuses to comply with his bid.⁶ In Pennsylvania, where the Orphan's Court has jurisdiction of the partition of decedents' estates, it is held that ejectment will not lie by heirs against a widow in possession, but the proceeding must be by partition in the Orphan's Court;⁷ nor dower against the heirs,⁸ unless the land is in the adverse possession of one denying her right, or not amenable to the process of the Orphan's Court;⁹ and may enforce the payment of owelty in partition.¹⁰ Specific performance of a decedent's contracts for the sale of land has been held to be within the jurisdiction "pertaining to probate courts," ¹¹ as well as to try questions of fraud incidental to any subject of which the probate court has jurisdiction.¹²

Validity of gifts *mortis causa*.

Jurisdiction * to

Indebtedness to the executor as creditor, heir, or legatee.

To try validity of trusts created by will.

the probate

To enforce remedies against a bidder in a sale of property constituting assets.

Partition lands.

Assign dower.

Specific performance of contracts for sale of lands.

¹ Fowler v. Lockwood, 3 Redf. 465, 470.

² Proctor v. Dicklow, 57 Kans. 119, 125.

³ Denegre v. Denegre, 33 La. An. 689.

⁴ Estate of Hinckley, Myr. 189, 194; Estate of Crooks, Myr. 247, 249.

⁵ Crew v. Pratt, 119 Cal. 139, 151; Estate of Crooks, *supra*. See also Hudgins v. Leggett, 84 Tex. 207; *ante*, § 151, p. * 346.

⁶ Succession of Bobb, 27 La. An. 344, 345; Bell's Appeal, 71 Pa. St. 471. But this is held differently in most States; *ante*, § 151.

⁷ Seider v. Seider, 5 Whart. 208, 217. The jurisdiction of probate courts to partition realty is discussed, *post*, § 567, p. * 1243.

⁸ Thomas v. Simpson, 3 Pa. St. 60, 67.

⁹ Evans v. Evans, 29 Pa. St. 277, 280. See the case of Mussleman's Appeal, 65 Pa. St. 480, 485, in which Agnew, J., reviews the history of the gradual enlargement of jurisdiction of the Orphan's Court in Pennsylvania.

¹⁰ Neel's Appeal, 88 Pa. St. 94.

¹¹ Adams v. Lewis, 5 Sawy. 229. Concurrent with chancery courts when conferred by statute: Lynes v. Hayden, 119 Mass. 482. Usually specific performance is held to be of purely equitable nature, concerning which probate courts have no jurisdiction, unless expressly conferred: Houston v. Killough, 80 Tex. 296; *ante*, § 149, p. * 340.

¹² Wade v. Labdell, 4 Cush. 510.

Where the power to award costs and enforce their payment is given, it is exclusive; a common-law court to which issues are sent

by the Orphan's Court cannot enter judgment for costs,¹ nor can an appellate court.² Costs * fol- [* 351]
 To adjudicate upon the question of costs. low the judgment or decree rendered, unless

otherwise expressed in the judgment; and when the term has lapsed at which the judgment was rendered, the probate court has no further power over it.³ It is held in Minnesota, that where

To elect dower for insane widow. a widow, who is entitled to her election between the provisions of a will and her dower, is incompetent, because

of unsoundness of mind, to make the election, it is the duty of the probate court to elect for her, unless there be a statutory power committed to the guardian or committee;⁴ in other States such power rests in chancery courts,⁵ or, being personal to the widow, is lost.⁶

§ 155. **Power to construe Wills.**—The jurisdiction of probate courts over the estates of deceased persons necessarily includes the power in the first instance to construe wills, whenever such construction

Construction of wills included in fixing the rights of legatees. tion is involved in the settlement and distribution of the estate of a testator. It is obvious that distribution cannot be made nor legacies ordered to be paid, unless the

rights of legatees are first adjudicated; and such adjudication involves the ascertainment of the testator's intention, in order to fix the rights of legatees in accordance therewith,⁷ and whether a bequest is valid or void,⁸ or adeemed.⁹ It is the decree of distribution that determines the rights of legatees and distributees; hence such order or decree is conclusive as to the rights of heirs, legatees and devisees, subject only to be set aside or modified on appeal.¹⁰ This power is given, however, only to the extent of determining to whom the executor must pay or deliver the funds of the estate in the

To determine to whom legacy goes. first instance, and does not extend to the determination of questions between legatees themselves, such as whether the legacy is absolute or for life only, or subject to trusts

¹ *Levy v. Levy*, 28 Md. 25, 29.

² *Johns v. Hodges*, 60 Md. 215, 228; *Brown v. Johns*, 62 Md. 333.

³ *Lucas v. Morse*, 139 Mass. 59.

⁴ *State v. Ueland*, 30 Minn. 277, 282.

⁵ *Kennedy v. Johnston*, 65 Pa. St. 451, 455.

⁶ *Collins v. Carman*, 5 Md. 503, 529; *Lewis v. Lewis*, 7 Ired. 72. See on this subject *ante*, § 119.

⁷ *Brown v. Stark*, 47 Mo. App. 370, 379; *State v. Ueland*, 30 Minn. 277, 282; *Glover v. Reid*, 80 Mich. 228; *Byrne v. Hume*, 84 Mich. 185; *Goldtree v. Allison*, 119 Cal. 344; *In re Verplanck*, 91 N. Y. 439, 450; *Du Bois v. Brown*, 1 Dem 317.

322; *Blasini v. Blasini*, 30 La. An. 1388, 1389; *Appeal of Schaeffner*, 41 Wis. 260, 264, approving *Brook v. Chappell*, 34 Wis. 405, 419; *Harrison v. Harrison*, 9 Ala. 470, 477; *Covert v. Sebern*, 73 Iowa, 564; *Crew v. Pratt*, 119 Cal. 139, 151.

⁸ *Johnson v. Langmire*, 39 Ala. 143; *Webster v. Seattle Co.*, 7 Wash. 642, determining shares of omitted heirs under a statute.

⁹ *May v. May*, 28 Ala. 141.

¹⁰ *Goad v. Montgomery*, 119 Cal. 552, 557. The conclusiveness of the order of distribution is treated of, *post*, §§ 561, 562.

or conditions.¹ In New York² a statute confers upon the surrogate of the county of New York, in a proceeding to prove a last will, the same power as is vested in the Supreme Court of that State to pass upon and determine the true construction, validity, and legal effect thereof, in case the validity of any of the dispositions contained in such will is contested, or the construction, or its legal effect, called in question by any of the heirs or next of kin of the deceased, or any legatee or devisee. The surrogate of New York construed this act as requiring him to exercise the authority of determining the legal effect and true construction of any of its provisions, as absolutely as the Supreme Court might do when it obtained jurisdiction;³ but this view was overruled by the Court of Appeals, holding that the effect of the statute was restricted to the proceedings in proving the will; and that the surrogate possessed no more power to try the validity of a disputed legacy, than to adjudicate upon the disputed claim of a creditor. "When in good faith an executor resists the charging of a legacy upon the residuary estate in his hands and shows that there is a real question of fact or of law in his refusal to allow it, the jurisdiction of the surrogate ceases, or has never attached. It is for the appropriate court of law or equity to adjudicate upon the matter. When determined there, the surrogate may go on with the accounting, or whatever other proceeding was before him when the question arose."⁴ This decision is modified by later cases, in which it is held that the surrogate has power to pass upon the construction of a will where the right to a legacy depends upon a question of construction which must be determined before a decree of distribution can be made, and that this power can be exercised on final accounting only, when all the parties who may be affected by the adjudication are brought in.⁵ By a later statute the power to construe the will, as to personality, is, under certain conditions, made to apply to all surrogates;⁶ but this does not give jurisdiction where the disposition of personality and realty is inseparately connected,⁷ nor where title is claimed paramount to the estate.⁸

In Maryland the orphans' courts have power to take probate of wills, but not to adjudicate questions of title dependent upon their operation and effect, or to decide upon the right of disposition.

¹ *Bramell v. Cole*, 136 Mo. 201.

² *Laws*, 1870, ch. 359, § 11.

³ *Danser v. Jeremiah*, 3 Redf. 130, 137.

⁴ *Bevan v. Cooper*, 72 N. Y. 317, 327 *et seq.*; *Fraenznick v. Miller*, 1 Dem. 136.

⁵ *Riggs v. Cragg*, 89 N. Y. 479, 492, and cases *supra*; *In re Verplanck*, 91 N. Y. 439, 450; *Garlock v. Vandevort*, 128 N. Y. 374 (holding the surrogate's jurisdiction under such circumstances to

be equal to and concurrent with that of the Supreme Court); *Tappan v. Church*, 3 Dem. 187, disapproving *Fraenznick v. Miller*, *supra*.

⁶ *Code*, Civ. Pr. § 2624.

⁷ *Matter of Schrader*, 63 Hun. 36. *A fortiori* to devise of real estate: *Merriam's Will*, 136 N. Y. 58.

⁸ *Walker's Will*, 136 N. Y. 20.

In Maryland
Maine,
Rhode Island.

"When probate is granted, authority to determine what passes under the will is devolved upon the courts of law and equity, tribunals which are clothed with ample jurisdiction to decide that question."¹ So, until recently, in Maine,² and, it seems, in Rhode Island.³ The difference in the functions of courts of probate and courts of construction is mentioned elsewhere.⁴

It may be proper to note in this connection the power of courts of equity in respect of the construction of wills, upon the application of an executor, administrator, or other trustee, or even of a *cestui que trust*, to determine questions of doubt in carrying trusts into effect.⁵ The power arises out of the jurisdiction of courts of equity to decree the payment of legacies (because the ecclesiastical courts could neither take the accounts necessary sometimes *to ascertain the amount of [* 353] legacies, nor enforce their decrees), and to entertain bills of interpleader (in cases of conflicting trusts, to save trustees from hazardous responsibility and future litigation, or of conflicting legal claims against one who has no interest in the thing claimed, but is a mere stakeholder).⁶ It is deduced from the equity jurisdiction given by statute in cases of trust arising in the settlement of estates, where the trustees are actors and seek the aid and direction of a court of equity in cases of doubt and difficulty, and where conflicting claims are asserted by different parties to the same property or rights under the instrument creating the trust;⁷ and is expressly conferred by statute in some of the States.⁸ Where equity jurisdiction is conferred upon the probate court, it may be applied to for instructions as to the construction of a will;⁹ but the power does not reside in such courts unless expressly, or by necessary implication, conferred.¹⁰ Thus an

In the probate court.

¹ Schull v. Murray, 32 Md. 9, 15, 16, citing the case of Michael v. Baker, 12 Md. 158, 169; Ramsey v. Wilby, 63 Md. 584, citing earlier cases.

² The probate court "has no power to construe a will, — to determine its effect upon the distribution of the estate, — or to adjudicate between the heirs and residuary legatees": Hanscom v. Marston, 82 Me. 288, 296. But by a recent statute probate courts are empowered to order distribution according to the will: Laws 1891, ch. 49.

³ Williams v. Herrick, 18 R. I. 120.

⁴ Post, § 222, p. * 485; § 228, p. * 502.

⁵ See on this point 1 Redf. on Wills, 438, 493; Schoul. Ex. §§ 265, 473; Story, Eq. § 1065; Rosenberg v. Frank, 58 Cal. 387, 399; Williams v. Williams, 73 Cal. 99.

⁶ Tayloe v. Bond, per Pearson, J., Busb. Eq. 5, 15.

⁷ Treadwell v. Cordis, 5 Gray, 341, 348; Mechanics' Bank v. Harrison, 68 Ga. 463, 469, relying on Miles v. Peabody, 64 Ga. 729.

⁸ Such statutes are construed in Williams v. Williams, 73 Cal. 99; Horton v. Cantwell, 108 N. Y. 255, 263; First Baptist Church v. Robberson, 71 Mo. 326, vindicating the jurisdiction of chancery courts by the majority, p. 334, JJ. Hough (p. 339) and Henry (p. 352) holding the jurisdiction to reside in the probate court.

⁹ Swasey v. Jaques, 144 Mass. 135. The pleadings and practice ought to conform substantially, in such case, to the equity procedure: Green v. Hogan, 153 Mass. 462.

¹⁰ Chadwick v. Chadwick, 6 Mont. 566

executor, administrator *c. t. a.*, or any party claiming against him, may apply to a court of equity to have his rights in the estate ascertained and settled in respect of testamentary trusts which may be valid or invalid; for the executor holds the property in trust for the persons to whom it is legally bequeathed, and for those who are entitled to it under the Statute of Distributions if not effectually disposed of by the will. So in respect of property devised, and where there is a mixed trust of real and personal estate, questions may arise as to the validity and effect of contingent limitations, or other doubtful points, which it becomes necessary to decide in order to make a final settlement, and to give proper instructions and directions touching the execution of the trusts.¹ It is evident that application, whether by an executor, administrator, or devisee, heir at law, or any other person, for the construction of a will, or other aid to the proper execution of a trust, can only be made when necessary for

the present action of the court, upon which it may enter a [* 354] decree or * direction in the nature of a decree; for a court will never give an abstract opinion or advice.² Nor does the principle upon which courts administer this species of relief extend to questions growing out of the past management of the estate or trust, involving an inquiry into the validity of such management.³ Hence a court of equity will not judicially construe a devise on the application of an heir at law, where no trust is involved, for that is a purely legal question to be decided by a court of law, nor pass upon any question properly triable in another court,⁴ and a court of

576; *Washbon v. Cope*, 144 N. Y. 287; *First Baptist Church v. Robberson*, *supra*. "If, at the time, a question as to the construction of a will needs to be decided, the probate court can be resorted to, and the jurisdiction is adequate for the purpose, that court must be resorted to, and chancery cannot be:" *Ward v. Church*, 66 Vt. 490, quoting from an earlier case.

¹ *Bowers v. Smith*, 10 Paige, 193, 199, *per* Chancellor Walworth; *Read v. Williams*, 125 N. Y. 560, holding that the next of kin may maintain the action. One who claims as a purchaser simply, through an heir or devisee, cannot maintain the bill: *Mellen v. Mellen*, 139 N. Y. 210, 217; and in some States it is held that heirs and legatees have no right to ask the advice of courts, at least as to matters in controversy between themselves: *Belfield v. Booth*, 63 Conn. 299, 307.

² *Little v. Thorne*, 93 N. C. 69, 71; *Taylor v. Bond*, Busb. Eq. 5; *Wead v. Cantwell*, 36 Hun, 528; *Caspersen v. Dunn*, 42 N. J. Eq. 87; *Muldoon v. Mul-*

doon, 133 Mass. 111; *Wilbur v. Maxam*, 133 Mass. 541; *Bullard v. Chandler*, 149 Mass. 532; *Morse v. Lyman*, 64 Vt. 167; *Bowen v. Bowen*, 38 Oh. St. 426, 428; *Rexroad v. Wells*, 13 W. Va. 812; *Gaffney v. Kenison*, 10 Atl. R. (N. H.) 706, citing *Greely v. Nashua*, 62 N. H. 166; *Bullard v. Attorney-General*, 153 Mass. 249, in which it is said: "The court has often declined to give instructions as to what disposition shall be made of a fund on the occurrence of a future event, even when it was certain that the event must occur." But sometimes courts will decide questions which have not arisen, but are "pretty certain" to arise in the execution of a trust: *per* *Durfee*, C. J., in *Goddard v. Brown*, 12 R. I. 31, 41.

³ *Sohier v. Burr*, 127 Mass. 221, 224; *Miles v. Strong*, 60 Conn. 393.

⁴ *Simmons v. Hendricks*, 8 Ired. Eq. 84; *Bowers v. Smith*, 10 Paige, 193, 200; *Mellen v. Mellen*, 139 N. Y. 210; *Tyson v. Tyson*, 100 N. C. 360; *Woodlief v. Merritt*, 96 N. C. 226; *Collins v. Collins*,

chancery has not jurisdiction after the probate court has passed on the questions at the time of settlement and distribution.¹ Nor will a court of equity, without urgent reasons, interfere with the discretion vested in a trustee;² nor does the court take the place of counsel, to act as general legal adviser to an administrator or other fiduciary respecting his official duties;³ and it is said that courts are not bound to entertain applications for the construction of doubtful wills, and that they will, in their discretion, refuse to do so except where great interests are involved, and a decision in the ordinary course of litigation would be attended with great inconvenience, delay, and expense.⁴ But having acquired jurisdiction for the purpose of construing the will, they have authority to do complete justice between the parties by enforcing their adjudications,⁵ unless exclusive jurisdiction is vested in the court of probate, in which case the adjudication becomes binding as the law of the will, to be carried out by the probate court.⁶

It is self-evident that the decree or adjudication rendered is binding on those only who have been made parties to the proceeding;⁷ hence, if the judgment of the court is invoked on a particular sentence of the will, which is so connected with other * sen- [* 355] tences that these are necessarily affected by the adjudication, all parties interested in the construction of such other sentences should be made parties.⁸ And since a party must be present in the precise capacity in which he is sought to be charged, it is not sufficient that one who may be interested as an heir at law has been made a party as legatee or devisee.⁹ Where the application is made by an executor in good faith, under circumstances creating a doubt as to the intention of the testator or the rights of legatees or heirs, the costs are payable out of the estate;¹⁰ not so, however,

19 Oh. St. 468; *Bailey v. Briggs*, 56 N. Y. 407, 413; *Pratt v. Pond*, 5 Allen. 59; *Sprague v. West*, 127 Mass. 471; *Bullard v. Attorney-General*, 153 Mass. 249; *Mincker v. Simonds*, 172 Ill. 323.

¹ *Ward v. Church*, 66 Vt. 490.

² *Greer v. McBeth*, 13 Rich. L. & Eq. 254.

³ *Clay v. Gurley*, 62 Ala. 14, 19.

⁴ *Crosby v. Mason*, 32 Conn. 482, 484. *A fortiori*, if complete relief can be obtained in the probate court: *Wager v. Wager*, 89 N. Y. 161, 168; *Siddall v. Harrison*, 15 Pac. R. 130.

⁵ *Nash v. Simpson*, 78 Me. 142, 151; *Wager v. Wager*, 89 N. Y. 161.

⁶ *Allen v. Barnes*, 12 Pac. R. (Utah) 912, 915.

⁷ *Bowers v. Smith*, 10 Pai. 193, 201.

⁸ *Magers v. Edwards*, 13 W. Va. 822, 831.

⁹ *Lomerson v. Vroom*, 11 Atl. R. (N. J.) 13.

¹⁰ *Rogers v. Ross*, 4 John. Ch. 608; *Morrell v. Dickey*, 1 John. Ch. 153, 156; *Sawyer v. Baldwin*, 20 Pick. 378, 388; *Howland v. Green*, 108 Mass. 277, 285; *Drew v. Wakefield*, 54 Me. 291, 300; *Jacobus v. Jacobus*, 20 N. J. Eq. 49, 54; but see *Urey v. Urey*, 5 S. W. R. 859, 864, in which all parties except non-residents were required to pay their own attorneys. So in *Kimball v. Bible Soc.*, 65 N. H. 139, 159, it is held that the costs of litigation and attorneys' fees incurred between defendant claimants cannot be paid out of the estate in favor of those who are unsuccessful in their contentions.

where the proceeding was unnecessary or frivolous, in which case the party causing it must bear the costs.¹

§ 156. **Exclusive and Concurrent Jurisdiction.** — **Jurisdiction of Federal Courts.** — The jurisdiction exercised by probate courts in the matter of admitting wills to probate, appointing administrators, and taking administration bonds, is exclusive of all other courts or tribunals in all the States. Other matters committed to their jurisdiction are, generally, within their exclusive original jurisdiction, any party interested having, in most States, a right to appeal and have a trial *de novo* in the appellate court. From the nature of the jurisdiction so conferred, it is evidently essential that the adjudications upon the subject-matter, not appealed from or reversed in direct proceeding, shall be final, not only in the courts in which they are pronounced, but in all other courts where the same question arises.² Hence a superior court has no power, in the exercise of its chancery jurisdiction, to set aside a will which has been admitted to probate, or to remove an executor,³ or to control an administrator in the discharge of the ordinary duties of his office, while the administration is pending in the probate court,⁴ or to subject the lands of heirs to the payment of debts of the ancestor, if the creditors have [* 356] * failed to present their claims for allowance in the probate court;⁵ nor to allow and enforce payment of a claim against an estate;⁶ nor has a common-law court power to try an action purely probate in its character, having for its object the recognition of heirs, legatees, or distributees, and establishing their rights judicially.⁷

Exclusive jurisdiction to prove wills and grant administration.

Superior court no power to revoke probate and to control administrator.

Or order the sale of lands for payment of debts.

Payment of legacies and distribution.

In some States, courts of equity have retained concurrent jurisdiction with probate courts in some respects, chiefly in the matter of compelling executors or administrators to account.⁸ The general

¹ *Mundell v. Green*, 108 Mass. 277, 283.

² See *ante*, § 145; *Martin v. Roach*, 1 Harring. 477, 486.

³ *Tudor v. James*, 53 Ga. 302; *Leddel v. Starr*, 19 N. J. Eq. 159, 163. The subject of chancery jurisdiction to remove an executor or administrator is more fully discussed *post*, § 267; and of chancery jurisdiction to set aside probate of a will, *post*, § 227.

⁴ *Overton v. McFarland*, 15 Mo. 312; *Pearce v. Calhoun*, 59 Mo. 271, 273.

⁵ *Titterington v. Hooker*, 58 Mo. 593. As to jurisdiction of chancery to order a sale to pay debts before final settlement, see *post*, § 463, p. * 1022.

⁶ See cases cited *post*, § 392, p. * 816. As to chancery jurisdiction of claims accruing after final settlement, see *post*, § 579, p. * 1271.

⁷ *Linsbigler v. Gourley*, 56 Pa. St. 166, 171; *Hart v. Hoss*, 22 La. An. 517; *Lusk v. Benton*, 30 La. An. 686, 688. See also *Proctor v. Dicklaw*, 57 Kans. 119, 126.

⁸ *Clark v. Perry*, 5 Cal. 58; *Brown's Appeal*, 12 Pa. St. 333; *Seibert's Appeal*, 19 Pa. St. 49; *McLean v. Wade*, 53 Pa. St. 146; *People v. Barton*, 16 Colo. 75; *Bivins v. Marvin*, 96 Ga. 268, 270; *Ritch v. Bellamy*, 14 Fla. 537; *Dean v. Wilcoxon*, 25 Fla. 980; *Ligon v. Ligon*, 105

Concurrent jurisdiction. tendency, however, is to vest exclusive original jurisdiction over executors, administrators, guardians, curators, etc., in probate courts, arming them with ample powers, both in the extent of their jurisdiction and their mode of procedure, for the accomplishment of those purposes which could not be attained in the English testamentary courts and rendered necessary the interference of equity courts.¹ Hence, in this country, courts of equity do not generally interfere in the administration of estates, except in aid of the probate courts, where the powers of these are inadequate to the purposes of perfect justice, and then for the same reasons which induce them to interfere with the jurisdiction of common-law courts.² Where, for instance, an administrator dies before settling his administration account, and the same person is appointed his administrator, and also administrator *de bonis non* of his intestate,³ the proper tribunal before which to make the settlement is a court of chancery.⁴ So where it is necessary to restrain the * sale of real estate in protection [* 357] of the interest of the heirs,⁵ involving the accounting by the administrator;⁶ or to protect the estate against fraud or waste by the administrator where the probate court is powerless,⁷ or in case of collusion between the executor and a creditor,⁸ or, generally, where there is an evident mistake or fraud in the settlement,⁹ or

Ala. 460; *Carter v. Christy*, 57 Kans. 492; *Shoemaker v. Brown*, 10 Kans. 383; *Lynes v. Hayden*, 119 Mass. 482. See *post*, §§ 500 and 503, as to the concurrent jurisdiction between chancery courts and courts of probate, in compelling executors and administrators to account.

¹ Story, Eq. Jur. § 543 *a*, Redfield's (10th) ed.

² *Winslow v. Leland*, 128 Ill. 304, 342; *Adams v. Adams*, 22 Vt. 50, 58; *Moulton's Estate*, 9 Utah, 159; *Meyer v. Garthwaite*, 92 Wis. 571; *Bryan v. Hickson*, 40 Ga. 405, 408; *Irvin v. Bond*, 41 Ga. 630, 650; *Jeter v. Barnard*, 42 Ga. 43, 44. In Alabama, when the administration is removed to the chancery court, that court must proceed to a complete settlement of all matters involved: *Tygh v. Dolan*, 95 Ala. 269; and any distributee, at any time before the jurisdiction of the probate court has been exercised, may have the estate removed to a court of equity from the probate court in the then condition to be completed: *Baker v. Mitchell*, 109 Ala. 490.

³ In Alabama, in such case, the settlement by the administrator with himself

as administrator *de bonis non* is void: *Hays v. Cockrell*, 41 Ala. 75, 80, for which reason, the probate court being powerless to act, it is said that the jurisdiction of the court of chancery is exclusive: p. 81. So also, where joint executors are removed and one of them is appointed administrator *de bonis non*, etc.: *Martin v. Atkinson*, 108 Ala. 314.

⁴ *Carswell v. Spencer*, 44 Ala. 204, 206; *Buchanan v. Thomason*, 70 Ala. 401. So, in some States, if the surviving is also administrator of the deceased partner: *Heward v. Slagle*, 52 Ill. 336, 340; or administrator and guardian of the distributee: see on this point, *post*, § 506, p. * 1128.

⁵ *McCook v. Pond*, 72 Ga. 150; *First Baptist Church v. Lyons*, 51 N. J. Eq. 363.

⁶ *Finger v. Finger*, 64 N. C. 183, 186.

⁷ *Freeman v. Reagan*, 26 Ark. 373, 378; *Ragsdale v. Holmes*, 1 S. C. 91, 95.

⁸ *Fleming v. McKesson*, 3 Jones Eq. 316, 318.

⁹ *Brackenridge v. Holland*, 2 Blackf. 377, 380, referring to *Allen v. Clark*, 2 Blackf. 343; *Gafford v. Dickinson*, 37 Kans. 287.

the probate court, by reason of its limited powers, cannot administer proper relief.¹ So a non-resident executor, relieved by the will from giving bond, will be compelled, at the instance of a legatee whose legacy is not yet due and payable, to give security for its payment into court, where there is just cause to apprehend loss;² and an executor formerly domiciled in another State may be called to account in equity by an unpaid legatee;³ and where unadministered assets are found, too little in value to justify the opening of an administration, and but one creditor, chancery will subject them to the payment of that debt.⁴ But where the jurisdiction of the probate court has once properly attached, no other court will interfere or go behind its judgments or decrees, without special and sufficient reasons.⁵

The Jurisdiction of Federal Courts is conferred upon them by the Constitution of the United States and the laws of Congress in pursuance thereof; and where the requisites of jurisdiction exist, this jurisdiction cannot be ousted or annulled by statutes of the States, though assuming to confer it exclusively on their own courts.⁶ It is held that the equity jurisdiction in administration suits, conferred on the federal courts, is the same that the High Court of Chancery in England possesses; that it is subject to neither limitation nor restraint by State legislation, and is uniform throughout the different States of the Union.⁷ A citizen of another State may, therefore, establish a debt

Federal jurisdiction affecting administration.

¹ *Clark v. Head*, 75 Ala. 373; *In re Hyde*, 47 Kans. 277, 281; and see cases cited *post*, § 503, p. *1124, on the same subject. Hence equity has jurisdiction of an action by an infant to set aside a fraudulent sale of land made by an executor: *Hawley v. Tesch*, 72 Wis. 299.

² *Walker v. Johnson*, 82 Ala. 347.

³ *Colbert v. Daniel*, 32 Ala. 314, 330.

⁴ *Mallory v. Craig*, 15 N. J. Eq. 73, 74.

⁵ *Seymour v. Seymour*, 4 John. Ch. 409; *Savage v. Benham*, 17 Ala. 119, 126; *Moren v. McCown*, 23 Ark. 93, 94; *Page v. Ralph*, 55 Ark. 52; *Womack v. Womack*, 2 La. An. 339, 341; *Branton v. Branton*, 23 Ark. 569, 579; *Deck v. Gerke*, 12 Cal. 433, 436; *Search v. Search*, 27 N. J. Eq. 137, 140; *Kothman v. Markson*, 34 Kans. 542, 550; *Dolan v. Dolan*, 91 Ala. 152; *Harland v. Person*, 93 Ala. 273; *Shepard v. Speer*, 140 Ill. 238; *Ames v. Ames*, 148 Ill. 321; *Green v. Tittman*, 124 Mo. 372, 378; *Boltz v. Schutz*, 61 Minn. 444, 446; *Proctor v. Dicklaw*, 57 Kans. 119. See also, in connection herewith, *post*, § 503, p. *1124.

⁶ *Hess v. Reynolds*, 113 U. S. 73, 77, and cases cited. A proceeding to sell lands to pay decedent's debts was held to be within the act for the removal of suits to federal courts, in *Elliott v. Shuler*, 50 Fed. R. 454.

⁷ *Borer v. Chapman*, 119 U. S. 587, 600; *Payne v. Hook*, 7 Wall. 425, 430. See also *Lawrence v. Nelson*, 143 U. S. 215, *Hayes v. Pratte*, 147 U. S. 557, 570, and *Arrowsmith v. Gleason*, 129 U. S. 86, 98. Judge Thayer, in *Walker v. Brown*, 27 U. S. A. 291, observes that "the jurisdiction of these courts [federal] over the administration of estates is less extensive than that which was formerly exercised by the English chancery courts. Their jurisdiction at best is but a limited one," etc.: p. 303 of the opinion. But in addition to the jurisdiction exclusively conferred on them the State probate courts may have some of the general equity powers: "Whenever, in the exercise of this concurrent jurisdiction, the probate court has adjudicated upon a matter within the scope of its authority, such effect will be

against the estate in a federal court;¹ or, if he is not chargeable with laches, maintain a bill after final settlement, to charge heirs, devisees, and legatees to the extent of assets received by them, with ancestral debts, though the claim was not presented against the estate within the time limited by the special statute of non-claims provided by the State law; but failure so to establish the claim is evidence of laches and should be satisfactorily explained;² or a foreign distributee may establish in the federal court his right to a share in the estate, and enforce such adjudication against the administrator personally and his sureties, or against any other parties subject to liability, so long as the possession of the property by the State court (holding through the administrator) is not interfered with;³ or, it seems, foreclose a mortgage given by the deceased in his lifetime.⁴

But, as was recently announced by the Supreme Court of the United States in an exhaustive opinion delivered by Justice Brewer, the federal courts have no original jurisdiction with respect to the administration of estates of deceased persons; they cannot draw to themselves, by reason of any of the powers enumerated, the *res*, or administration itself; nor make any decree looking to the mere administration of the estate; nor can they in any way disturb the possession of the decedent's property held by an administrator appointed by a State court, and thus, through him, dispossess that court of its custody.⁵ The rights of parties as given or restricted by the probate jurisdiction of the State courts are fully recognized by the federal tribunals;⁶ hence the claims established by a resident of another State in the United States court cannot be enforced by direct process against the decedent's property, but must take its place and share in the estate as administered in the probate court.⁷ Nor can action be taken in the United States

Federal courts cannot assume control of the administration itself, but only decide the status of non-residents to the estate.

Claims allowed by U. S. courts are enforced by proceedings in probate courts like other claims.

given in the courts of the United States to that judgment as by the laws of the State it is entitled to; subject to any such adjudication the complainant is entitled to have the matter involved adjudicated by the court whose jurisdiction is invoked": *Constock v. Herron*, 5 C. C. A. 266, 275; *s. c.* 6 U. S. App. 626.

¹ *Hess v. Reynolds*, 113 U. S. 73; *Yonley v. Lavender*, 21 Wall. 276. But execution cannot be issued thereon (see statement, *infra*).

² *Continental Bank v. Heilman*, 81 Fed. R. (C. C.) 36; *Public Works v. Columbia College*, 17 Wall. 521; *Borer v. Chapman*, *supra*.

³ *Borer v. Chapman*, 119 U. S. 587, and

Payne v. Hook, 7 Wall. 425, as explained in *Byers v. McAuley*, 149 U. S. 608; *Brendel v. Charch*, 82 Fed. (C. C.) 262 (action for a legacy).

⁴ *Edwards v. Hill*, 19 U. S. A. 493.

⁵ *Byers v. McAuley*, 149 U. S. 608, reviewing prior decisions, Justice Shiras and Chief Justice Fuller dissenting.

⁶ *Thayer, J.*, in *Walker v. Brown*, 27 U. S. App. 291, 303; *Sowls v. First National Bank*, 54 Fed. R. 564; and if the United States appear as claimant in a State probate court, the proceedings are governed by the local law: *United States v. Hailey*, 2 Idaho, 26, 30.

⁷ *Byers v. McAuley*, 149 U. S. 608, 620; *Yonley v. Lavender*, 21 Wall.

courts to compel the closing of an administration,¹ or to restrain, at the instance of the executor and legatee residing in the testator's foreign domicile, an administrator ordered to distribute an estate, from so disposing of the assets in disregard of the provisions of the will.² So also the federal courts have no jurisdiction to grant original probate or letters, such jurisdiction being exclusively in the State probate courts;³ but while the probate of a will *ex parte* is *in rem*, and, not being between parties, cannot be removed to the federal courts, yet, where such will is contested in pursuance of statutory provisions, and becomes a suit *inter partes*, residing in different States, the federal courts take jurisdiction as they would in any other controversy between the parties.⁴ After a will has been established in the State court the federal courts have jurisdiction to interpret its provisions in an action between citizens of different States.⁵ But it is held that where the exercise of federal jurisdiction depends upon diverse citizenship it must be confined to the administration of the rights of such diversely domiciled citizens, and them alone.⁶

Cannot compel close of administration.

Federal courts no jurisdiction to grant original probate of wills.

But otherwise on contest and interpretation of will.

276. (In the last-mentioned case Justice Davis adds an intimation that in case of possible State legislation purposely discriminating against non-resident creditors, the United States courts "would find a way, in a proper case, to arrest discrimination . . . even if the estate were seized by operation of law and intrusted to a particular jurisdiction.") See, also, *In re Kittson*, 45 Minn. 197; and *post*, § 166, p. *374.

¹ *Smith v. Worthington*, 10 U. S. App. 616, 627.

² *Gaines v. Wilder*, 13 U. S. App. 180.

³ *Hargroves v. Redd*, 43 Ga. 142, 150; *Comstock v. Herron*, 5 C. C. A. 266, 275; s. c. 6 U. S. App. 626; *Reed v. Reed*, 31 Fed. (C. C. Ohio) 49.

⁴ *Gaines v. Fuentes*, 92 U. S. 10 (three judges, however, dissenting); *Ellis v. Davis*, 108 U. S. 485, 497; *Richardson v. Green*, 61 Fed. R. (C. C. A.) 423; *Franz v. Wahl*, 81 Fed. Rep. 9; and if the ground in the affidavit is local prejudice, etc., the application for removal is not too late, though made after an appeal, provided the hearing was to be *de novo* before a jury in the appellate court: *Brodhead v. Shoemaker*, 44 Fed. R. (C. C. Ga.) 518 (distinguishing between *ex parte* and solemn probate).

⁵ *Wood v. Paine*, 66 Fed. R. 807.

⁶ *Security Co. v. Pratt*, 65 Conn. 161.

* CHAPTER XVII.

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DOMICILIARY AND ANCILLARY JURISDICTION.

§ 157. **Authority of Representatives limited to the State granting it.** — The property of deceased persons is vested by law in representatives who, for the purposes of its devolution, continue the person of the defunct.¹ The authority of these representatives emanates from the law of the State or country under which they hold letters testamentary or of administration; and since it is universally recognized that the laws of every State affect and bind directly all property within its territorial limits and all persons residing therein, whether natural-born citizens, subjects, or aliens; and that a State may, therefore, regulate the manner and circumstances under which property within it, whether real or personal, shall be held, transmitted, and enforced,² — it is evident that no one can, in a representative capacity, whether *a testato* or *ab intestato*, meddle or interfere with a succession before probate of the will or grant of administration, or some other formal induction into the property in the forum of the country or State where it is found.³ This is the necessity of the rule, recognized in England⁴ as well as in the federal⁵ and State courts of America,⁶

Principle of the limitation of authority to property within the State granting administration.

Letters testamentary or of administration have no extra-territorial effect.

¹ *Ante*, § 10; *post*, § 170.

² *Sto. Confl. L.* § 18; *Minor v. Cardwell*, 37 Mo. 350, 353; *Vaughan v. Northup*, 15 Pet. 1, 5; *Walton v. Hall*, 66 Vt. 455.

³ *Westl. Pr. Int. L.* § 291; *Fenwick v. Sears*, 1 Cr. 259, 282; *Graeme v. Harris*, 1 Dall. 456; *Patterson v. Pagan*, 18 S. C. 584, citing *Dial v. Gary*, 14 S. C. 573, 579.

⁴ *Wms. Ex.* [362].

⁵ *Dixon v. Ramsay*, 3 Cr. 319, 323; *Kerr v. Moon*, 9 Wheat. 565, 571; *Noonan v. Bradley*, 9 Wall. 394, 399, *et seq.*; *Eells v. Holder*, 2 McCrary, 622.

⁶ The cases so holding are very numerous; among them are, in Alabama: *Broughton v. Bradley*, 34 Ala. 694, 708; Arkansas: *Clark v. Holt*, 16 Ark. 257,

263; *Greer v. Ferguson*, 56 Ark. 324; California: *Brown v. Gaslight Co.*, 58 Cal. 426; Connecticut: *Hobart v. Turnpike Co.*, 15 Conn. 145, 147; Georgia: *Turner v. Linam*, 55 Ga. 253, 255; Illinois: *Hickox v. Frank* (showing that the authority of a foreign administrator depends upon the law of the forum), 102 Ill. 660; Iowa: *McClure v. Bates*, 12 Iowa, 77; Indiana: *Naylor v. Moody*, 2 Blackf. 247; Kentucky: *Dorsey v. Dorsey*, 5 J. J. Marsh. 280; Kansas: *Moore v. Jordan*, 36 Kans. 271; Louisiana: *Succession of Roffignac*, 21 La. An. 364; Maine: *Smith v. Guild*, 34 Me. 443; Maryland: *Barton v. Higgins*, 41 Md. 539, 546; Massachusetts: *Trecothick v. Austin*, 4 Mass. 16, 32, and cases cited by Story, J.; Michigan: *Sheldon v. Rice*, 30 Mich. 296, 302;

that letters testamentary and of administration have no legal [* 359] force or effect beyond the territorial * limits within which the authority of the State or country granting them is recognized as law.¹

§ 158. **Administration of Same Succession in Different Countries.**

— It follows from this doctrine that where a person dying leaves property in several different jurisdictions, the legal representatives of such person must derive their authority from each of as many sovereignties as may have jurisdiction over the property so left, because the territorial element of the law, or rather of the sovereignty from which the law emanates, permits no other sovereignty to exercise authority over it, and each therefore must itself create the legal ownership necessary in its devolution.² This authority or legal ownership may be, and except in the States in which non-residence disqualifies a person from the office of executor or administrator³ generally is, conferred upon the same person in several or all of the States in which the deceased person left property; for a testator may appoint the same or different executors in different countries,⁴ and it is held that *ex comitate*, and in order to preserve as far as possible the singleness of administration, the person who obtains administration as next of kin in the jurisdiction of the intestate's domicil, or his attorney, is entitled to a similar grant in any other jurisdiction where the deceased has personal estate;⁵ but the administration in each State is wholly independent, whether in the hands of the same or of different executors or administrators,⁶ in no

Same person may administer in different States;

but the administration in each State is independent.

[* 360] wise impaired, * abridged, or affected by a previous, and a

Mississippi: *Riley v. Moseley*, 44 Miss. 37, 43; Missouri: *Estate of Ames & Co.*, 52 Mo. 290, 293; *Emmons v. Gordon*, 140 Mo. 490; Montana: *Braithwaite v. Harvey*, 14 Mont. 208; New Hampshire: *Taylor v. Barron*, 35 N. H. 484; New York: *Doolittle v. Lewis*, 7 Johns. Ch. 45; North Carolina: *Sanders v. Jones*, 8 Ired. Eq. 246; *Grant v. Reese*, 94 N. C. 720, 729; Ohio: *Nowler v. Coit*, 1 Oh. 519; Pennsylvania: *Sayre v. Helme*, 61 Pa. St. 299 (as to the limitations of the rule in this State see *Laughlin v. Solomon*, 180 Pa. St. 177); South Carolina: *Carmichael v. Ray*, 1 Rich. 116; Tennessee: *Carr v. Lowe*, 7 Heisk. 84; Vermont: *Vaughn v. Barret*, 5 Vt. 333, 336; Virginia: *Dickinson v. McCraw*, 4 Rand. 158; West Virginia: *Oney v. Ferguson*, 41 W. Va. 568.

on Wills, 24, note 7, and authorities cited; 2 Kent, 431 *et seq.*; *Naylor v. Moffat*, 29 Mo. 126; *Wright v. Gilbert*, 51 Md. 146, 152.

² Westlake, Pr. Int. L. § 291; Story, Conf. L. §§ 513 *et seq.*

³ As to which see *post*, §§ 230, 241.

⁴ *Hunter v. Bryson*, 5 G. & J. 483; *Schultz v. Pulver*, 11 Wend. 361; *Fletcher v. Wier*, 7 Dana, 345, 349; *Sherman v. Page*, 85 N. Y. 123, 128.

⁵ Westl. Pr. Int. L. § 292, and authorities there cited; and see *post*, § 246, as to appointment of administrators; *Woodruff v. Schultz*, 49 Iowa, 430, 431.

⁶ So that the executor in one State is not bound to inventory, or in any wise account for, the assets of another executor in another State: *Sherman v. Page*, 85 N. Y. 123.

¹ Story, Conf. L. §§ 512, 513; 3 Redf.

No privity between administrators in different States of same estate, but there may be between executors.

fortiori by a subsequent, grant of administration in another State.¹ There is no privity between administrators in different States,² although there may be between executors of the same testator in different States,³ who, at common law, are said to be in privity as to the creditors.

The administration granted in the State of the domicile of the decedent, is the principal, primary, original, or chief administration, because the law of the domicile governs the distribution of the personal property, whether to heirs, distributees, or legatees;⁴ while that granted in any other country is ancillary or auxiliary.⁵ Both are local, however, to the jurisdiction in which they are granted, being limited to the chattels having a particular *situs*,⁶ independent of each other, save that the origin and devolution of the

¹ Henderson v. Clarke, 4 Litt. 277; Pond v. Makepeace, 2 Met. (Mass.) 114; Burbank v. Payne, 17 La. An. 15; Aspden v. Nixon, 4 How. 467, 497; McLean v. Meek, 18 How. 16; Banta v. Moore, 15 N. J. Eq. 97; Apperson v. Bolton, 29 Ark. 418, 435; Picquet, Appellant, 5 Pick. 65; Equitable Life Assurance Soc. v. Vogel, 76 Ala. 441, 446; Grant v. Reese, 94 N. C. 720, 729; Graveley v. Graveley, 25 S. C. 1, 19.

² Taylor v. Barron, 35 N. H. 484; Dent v. Ashley, Hems. 54; King v. Clarke, 2 Hill (S. C.) Ch. 611; Freeman's Appeal, 68 Pa. St. 151; Wells v. Wells, 35 Miss. 638; Keaton v. Campbell, 2 Humph. 224; Stacy v. Thrasher, 6 How. 44, 59; Hill v. Tucker, 13 How. 458, 466; Creswell v. Slack, 68 Iowa, 110, 113.

³ The privity between executors in different States, appointed by the same testator, is based upon the common-law doctrine, that the executor derives his authority from the will, while that of the administrator rests solely upon the appointment by the probate court: Hill v. Tucker, *supra*; Goodall v. Tucker, 13 How. 469; Hopper v. Hopper, 125 N. Y. 400 (holding that a judgment in one State against the same executor in another, would at least *prima facie* establish the claim and answer the plea of limitation), 406. This reason fails, however, in those States in which the authority of the executor is likewise deduced from his appointment by the court; and is not applicable

to an administrator *de bonis non cum testamento annexo*: Grant v. Reese, 94 N. C. 720, 730. But see Garland v. Garland, 84 Va. 181, 189, in which the court says: "An administrator with the will annexed is, in legal contemplation, executor of that will, and a decree against a domiciliary executor binds every executor of the same will in every jurisdiction." *A fortiori* is a decision in one State binding against the same executrix when she takes out letters in another State: Carpenter v. Strange, 141 U. S. 87, 105.

⁴ See *post*, § 565, and cases cited. "This," says Story, J., in Harvey v. Richards, 1 Mason, 381, 402, "although once a question vexed with much ingenuity and learning in courts of law, is now so completely settled by a series of well-considered decisions that it cannot be brought into judicial doubt." See Russell v. Madden, 95 Ill. 485, 491. A noteworthy exception to this general principle is made in Mississippi, where the statute directs personal property to be distributed according to the laws of that State: *post*, § 168.

⁵ Spraddling v. Pipkin, 15 Mo. 118; Gable's Estate, 79 Iowa, 178, 182; Goodall v. Marshall, 11 N. H. 88; Ordronaux v. Helie, 3 Sandf. Ch. 512; Clark v. Clement, 33 N. H. 563.

⁶ Green v. Rugely, 23 Tex. 539; McCord v. Thompson, 92 Ind. 565; Dial v. Gary, 14 S. C. 573; Reynolds v. McMullen, 55 Mich. 568.

property in each may be the same.¹ It follows from this want of privity that a judgment obtained [* 361] * against one furnishes no cause of action against another, so as to affect assets under the control of the other;² and it is immaterial that the judgment was obtained against the administrator of the foreign jurisdiction in person, upon due notice to him,³ or even upon his voluntary appearance.⁴ Nor will a judgment in favor of a foreign administrator against the debtor of his intestate support an action against the debtor by an administrator in another State.⁵ But a question determined by the courts of a sister State, so as to become *res judicata* between the parties, cannot be reopened by the same parties in another State.⁶ And where jurisdiction of an action against a corporation debtor of an estate is concurrent in two States, and suit is brought in one, the courts of the other State will, on the principle of comity, decline to entertain jurisdiction of a second action on the same debt.⁷

Judgment against administrator in one State not valid in another.

Judgment of sister State.

§ 159. Jurisdiction of Property removed to Another Country after

¹ Story, Conf. L. § 522. See *Manning v. Leighton*, 65 Vt. 84, on p. 102.

² *Brodie v. Brickley*, 2 Rawle, 431; *Low v. Bartlett*, 8 Allen, 259; *Aspden v. Nixon*, 4 How. 467; *Stacey v. Thrasher*, 6 How. 44; *McLean v. Meek*, 18 How. 16; *Johnson v. Powers*, 139 U. S. 156; *Ela v. Edwards*, 13 Allen, 48; *Merrill v. N. E. Ins. Co.*, 103 Mass. 245; *Taylor v. Barron*, 35 N. H. 484; *Dent v. Ashley*, Hamps. 54; *King v. Clarke*, 2 Hill (S. C.) Ch. 611; *Slauter v. Chenowith*, 7 Ind. 211; *Rosenthal v. Renick*, 44 Ill. 202, 207; *McGarvey v. Darnall*, 134 Ill. 367; *Turner v. Risor*, 54 Ark. 33; *Braithwaite v. Harvey*, 14 Mont. 208; *Price v. Mace*, 47 Wis. 23; *Creswell v. Slack*, 68 Iowa, 110, 113. And in *Johnson v. Johnson*, 63 Hun, 1, it is held that a judgment for or against an administrator in one State is of no effect for or against him in another State, though the same person administers the estate in both States. So also in *Judy v. Kelley*, 11 Ill. 211; and see *Bakewell, J.*, to same effect in *Rentschler v. Jamison*, 6 Mo. App. 135, 137.

³ *Rentschler v. Jamison*, 6 Mo. App. 135, 136.

⁴ *Judy v. Kelley*, 11 Ill. 211, 214; *Greer v. Ferguson*, 56 Ark. 324, 331. See remarks of Mr. Justice Brewer in *Reynolds v. Stockton*, 140 U. S. 254, on p. 272.

⁵ *Talmage v. Chapel*, 16 Mass. 71.

⁶ *Carpenter v. Strange*, 141 U. S. 87. Hence, where the domiciliary court, having competent jurisdiction to construe a will, adjudicates thereon, such adjudication is binding upon the courts of other States. *Washburn v. Van Steenwyk*, 32 Minn. 336, 357; *Ford v. Ford*, 80 Mich. 42, 50. But this doctrine does not go to the extent of depriving the courts of the State in which lands lie from construing the will as to such realty. Where a testator by a single will devises lands lying in two or more States, the courts of such States will construe it as to the lands situated in them respectively: *McCartney v. Osburn*, 118 Ill. 403, 411; s. c. 121 Ill. 408; *Staigg v. Atkinson*, 144 Mass. 564. A judgment on final accounting in one State is entitled to full faith and credit in the courts of another State, under the constitution and acts of Congress: *Fitzsimmons v. Johnson*, 90 Tenn. 416, 432; and so the disallowance of a claim in one State, being a judgment in favor of the estate, was held to be entitled as such to "full faith and credit" in another, and to be a bar: *Sanborn v. Perry*, 86 Wis. 361. So also a decree of distribution obtained in one State cannot be attacked on the ground of fraud and mistake in another State: *Mooney v. Hinds*, 160 Mass. 469.

⁷ *Sulz v. M. Association*, 145 N. Y. 563.

Owner's Death. — But it may be that the *situs* of property is changed after the death of the owner, and before any administrator reduces it into possession. In such case, since every administration operates on such property of the deceased as is at the time of the grant, or shall be at any time during its existence, within the jurisdiction of the court granting the same,¹ the question determining the jurisdiction is whether there is or is not any vacancy in the legal title to the property where and when found. For

Property removed from one State to another, after owner's death, goes to the first administrator who seizes it within his jurisdiction.

if goods are once in the legal possession of an administrator duly appointed, they cannot afterward be affected * by an ad- [* 362] ministration granted in another jurisdiction to which they may be removed, because there is then no vacancy in the legal ownership; they are, technically, no longer the goods of the deceased, but of the administrator of the jurisdiction from which they were removed.² But if the goods have never been in possession of the administrator, although they be removed from the jurisdiction where he might, but did not, take possession of them, an administrator of

Without regard to the priority in the grant of administration.

the jurisdiction to which they are taken may do so, without regard to priority in the grant of the respective administration. Thus, where stage-coaches and stage-horses belonged to a line running from one State to another, it was said that, if there had been different administrators in the two States, "the property must have been considered as belonging to that administrator who first reduced it into possession within the limits of his own State."³ So, also, ships and cargoes, and the proceeds thereof, may be situated in a foreign country at the time of the owner's death; but since they proceed according to their usage, on their voyages and return to the home port they are properly taken possession of and administered by the administrator of the *forum domicilii*.⁴ In Massachusetts it was held, that a sale by a foreign domiciliary administrator without taking out ancillary letters

¹ Thus the statute of Maine provides that letters of administration are granted to persons dying out of the State, not only when they leave property to be administered in the county, but when such property "is afterward found therein": *Saunders v. Weston*, 74 Me. 85, 89, 91. And the debt due to a resident of another State from one removing into the State of the forum after the creditor's death authorizes the appointment of an administrator on the estate of the creditor: *Piney v. McGregory*, 102 Mass. 186, 189.

² Westl. Pr. Int. L. § 295. See also *In re Hughes*, 95 N. Y. 55, 62, and *McCord v. Thompson*, 92 Ind. 565.

³ *Orcutt v. Orms*, 3 Pai. 459, 465; *Wells v. Miller*, 45 Ill. 382. But in North Carolina an administrator was held liable for negroes sent out of the State to an administrator in Tennessee before he qualified as administrator, on the ground that his appointment related back to the time of his intestate's death, and he might have reduced them into possession, and maintained an action for them in the State where appointed, or elsewhere: *Plummer v. Brandon*, 5 Ired. Eq. 190, 194, *et seq.*

⁴ Story, Conf. L. § 520; Whart. Conf. L. § 633; *Wells v. Miller*, *supra*.

in Massachusetts of a yacht which, when the intestate died, was in the State of domicile, but of which he took possession in Massachusetts, was valid, though the yacht was removed to the latter State before his appointment.¹

§ 160. **Legal Status of Foreign Administrators.**—No executor or administrator can, in his official capacity, originate or maintain an action in the courts of any country, save that which has granted him letters testamentary or of administration,² without authority from the country in which he brings the action; nor collect rents,³ or in any manner intermeddle with the property of the deceased in such country.⁴ The strict correlative of this proposition is, that [* 363] no *executor or administrator can be subjected to an action, in his official capacity, in the State or country in which he is not recognized as such;⁵ nor is he accountable except in the forum from which he obtained his authority, for assets collected in a foreign state⁶ by virtue of his office. By

Foreign administrator can maintain no action as such, unless authorized by statute.

Nor be sued as such.

¹ *Martin v. Gage*, 147 Mass. 204.
² *Ante*, § 157, and authorities; *Perkins v. Williams*, 2 Root, 462; *Nicole v. Mumford*, Kirby, 270; *Gilman v. Gilman*, 54 Me. 453; *McAnulty v. McClay*, 16 Neb. 418; *Lewis v. Adams*, 7 Pac. Rep. 779; s. c. 8 Pac. R. 619; *Barclift v. Treece*, 77 Ala. 528; *Kropff v. Poth*, 19 Fed. Rep. 200; *Moore v. Jordan*, 36 Kan. 271; *Gibson v. Ponder*, 40 Ark. 195, 199; *Gregory v. McCormick*, 120 Mo. 657.

³ *Smith v. Smith*, 13 Ala. 329; *Morrill v. Morrill*, 1 Allen, 132; *Rutherford v. Clark*, 4 Bush, 27; *Patterson v. Pagan*, 18 S. C. 584; *Eells v. Holder*, 2 McCrary, 622.

⁴ *Cabanné v. Skinker*, 56 Mo. 357, 367, and authorities cited by Judge Sherwood, approved in *Emmons v. Gordon*, 140 Mo. 490.

⁵ *Vaughan v. Northup*, 15 Pet. 1, 5; *Caldwell v. Harding*, 5 Blatchf. 501; *Greer v. Ferguson*, 56 Ark. 324; *Curle v. Moor*, 1 Dana, 445; *Garden v. Hunt*, Cheves, 42, Part II.; *Beeler v. Dunn*, 3 Head, 87; *Allsup v. Allsup*, 10 Yerg. 283; *Winter v. Winter*, Walker (Miss.), 211; *Sparks v. White*, 7 Humph. 86; *Davis v. Phillips*, 32 Tex. 564; *Hedenberg v. Hedenberg*, 46 Conn. 30, 33; *Durie v. Blauvelt*, 49 N. J. L. 114; *Fugate v. Moore*, 86 Va. 1045. In Pennsylvania the earlier decisions held that foreign executors should be recognized to a greater or

less extent, and that they could be sued by resident creditors: *Swearingen v. Pendleton*, 4 S. & R. 389; *Evans v. Tatem*, 9 S. & R. 552; these decisions were disapproved in later cases and criticised as laying down a doctrine which was an "anomaly produced by an unexampled spirit of comity," &c.: *Brodie v. Brickley*, 2 Rawle, 431, 437; *Magraw v. Irwin*, 87 Pa. St. 139, 142; while in still more recent cases the earlier decisions are again affirmed, and the intermediate ones disapproved: *Laughlin v. Solomon*, 180 Pa. St. 177, reviewing the decisions, and pointing out the trend of the early decisions, the departure therefrom and the return thereto, and concluding that "notwithstanding the adverse criticisms to which *Swearingen v. Pendleton* and the other cases have been subjected, we regard them as of unshaken authority, and it must be taken as the rule in Pennsylvania that a foreign executor within the jurisdiction of our courts is liable to suit by a resident creditor of his decedent, and such will be sustained unless it trenches unduly on the jurisdiction of another court already attached, or would expose parties subject to such jurisdiction to inequitable burdens."

⁶ *Succession of St. John*, 6 La. An. 192; *Brownlee v. Lockwood*, 20 N. J. Eq. 239; *Norton v. Palmer*, 7 Cush. 523; *Selectmen v. Boylston*, 2 Mass. 384; *Campbell v. Sheldon*, 13 Pick. 8, 23; *Mc-*

Such authority may be conferred by comity of the States.

Duty of administrators to collect assets in foreign States.

the comity of States the authority of domiciliary administrators is recognized in different jurisdictions to a greater or less extent;¹ and it is a matter concerning which the authorities differ, whether an administrator is guilty of laches or negligence in failing to collect assets beyond the jurisdiction of his forum, or obtaining letters in a foreign jurisdiction in which there may be property belonging to the estate.² If he collect such property in a foreign jurisdiction without authority, either under his domiciliary letters, or by new letters there obtained, he is liable to be sued in the courts of the foreign State, as one unlawfully intermeddling with the effects, by any creditor or other person interested; he would in such case be clearly liable as an executor *de son tort*, wherever this species of liability is still recognized,³ "for it would not lie in his mouth to deny that he had rightfully received such assets, and he could not rightfully receive them except as executor;"⁴ or as executor *de jure*, if the *intermeddling was not a *tortious* one.⁵ Where [* 364]

Namara v. McNamara, 62 Ga. 200, 204; Musselmann's Appeal, 101 Pa. St. 165; Cocks v. Varney, 42 N. J. Eq. 514. For the liability of an administrator or executor to account for assets received in a foreign jurisdiction, see *post*, § 537.

¹ See *post*, §§ 161, 167.

² It is held that an administrator is under no legal obligation to procure administration out of his own State, in *Sanders v. Jones*, 8 Ired. Eq. 246, citing earlier authorities; *Cabanné v. Skinker*, 56 Mo. 367; that it is *devastavit* if he refuse to procure such letters if the interest of the estate requires: *Helme v. Sanders*, 3 Hawks, 563; but it is clearly his duty to collect assets in a foreign jurisdiction if he can do so under the authority of his letters in the State of the domicile: *Schultz v. Pulver*, 3 Pai. 182; s. c. 11 Wend. 361; *Klein v. French*, 57 Miss. 662; *In re Ortiz*, 86 Cal. 306; see also § 162 and notes. Where he has possession of the note of a person living in another State, it is his duty to make reasonable effort to collect it without suit: *Grant v. Reese*, 94 N. C. 720, 731. The Supreme Court of Pennsylvania, after reviewing the decisions in that State, say: "But in no case has it been held that the mere fact of an administrator expending money in any reasonable effort to save the property of his intestate situate in another State, is sufficient to convict him of a *devastavit*. . . . To hold that the representatives of the personal estate

within the domicile owe no duty whatever to creditors or next of kin with reference to personalty outside the jurisdiction, is to invite neglect and consequent waste and dissipation of assets. That he has no standing as a suitor in a foreign jurisdiction does not alone fix the measure of his duty, nor has it ever been so regarded in practice. In thus holding, we do not intimate that he must go into a foreign jurisdiction and institute suits which could not be sustained, or offensively intermeddle with assets, so as to defy or disregard the jurisdiction of the courts of the *situs*. There are often many things he may do which suggest themselves to the prudent business man, tending toward the preservation of the estate, and are neither obnoxious to the law nor antagonistic to the interests of the foreign creditors": *Shinn's Estate*, 166 Pa. St. 121, 129. See also the remarks of the court in *McCully v. Cooper*, 114 Cal. 258, on p. 263, in the same strain.

³ *Campbell v. Tousey*, 7 Cow. 64; *Jones v. Jones*, 39 S. C. 247, 255. The remedy by action against any one as executor *de son tort* was subsequently abolished in New York by statute: *Brown v. Brown*, 1 Barb. Ch. 189, 195.

⁴ *Story*, Conf. L. § 514; *Allsup v. Allsup*, 10 Yerg. 283, 285.

⁵ *Tunstall v. Pollard*, 11 Leigh, 1, 27, retracting an intimation to the contrary in *Pugh v. Jones*, 6 Leigh, 299; *Marcy v*

a testatrix appoints different executors for effects in different States, and all of them qualify, the executors in one State are not bound to inventory or account for the effects in another State, being there administered.¹

§ 161. **Validity of Voluntary Payment to Foreign Administrator.**

— Upon the question of the validity of the voluntary payment of a debt to a foreign executor or administrator, the authorities are not unanimous. The tendency is, however, in the direction of recognizing the validity of such payments, when not conflicting with the home administration. Chancellor Kent held such a payment to be a good discharge of the debt.² And in Massachusetts it was asserted, that voluntary payment of a debt by the citizen of another State, in the State where the administrator received his appointment, is a good bar to an action for the same debt by an administrator of the State of the debtor's domicile;³ a proposition resulting of necessity from the liability of the debtor to pay wherever he may be reached by the creditor.⁴ Nelson, J., of the Supreme Court of the United States, says: "There is doubtless some plausibility in it [the objection to the validity of the voluntary payment to a foreign administrator], growing out of the interest of the home creditors. But it has not been regarded of sufficient weight to carry with it the judicial mind of the country. With the exception of the case in the State of Tennessee, none have been referred to, nor have our own researches found any, maintaining the invalidity of the payment. The question has been directly and indirectly before several of the courts of the States, and the opinions have all been in one direction,—in favor of the validity."⁵ So it is held that the

Voluntary payment by a debtor to a foreign administrator is a valid discharge if paid where he had jurisdiction to sue.

Marcy, 32 Conn. 308. When a debtor in Pennsylvania of a decedent dying domiciled in New Jersey has voluntarily paid to the foreign executor, he cannot subsequently, when such executor shall have obtained ancillary letters in Pennsylvania, claim as a creditor to have the ancillary accountant surcharged with the debt so paid him, where he has already accounted for the same in the domicile: Gray's Appeal, 116 Pa. St. 256.

¹ *Sherman v. Page*, 85 N. Y. 123, 128.

² In *Doolittle v. Lewis*, 7 John. Ch. 45, 49, which turned upon the validity of the sale of premises in New York securing the payment of a bond payable by a citizen of New York to a deceased resident of Vermont, "his heirs, executors, and administrators," by the administrators, of the intestate appointed in Vermont.

³ *Stevens v. Gaylord*, 11 Mass. 256, 264.

⁴ Story, Conf. L., § 515, and note 3; *Equitable Association v. Vogel*, 76 Ala. 441, 448.

⁵ *Wilkins v. Ellett*, 9 Wall. 740, 742, referred to with approval in *Wyman v. Halstead*, 109 U. S. 654. The cases referred to by Justice Nelson are *Williams v. Storrs*, 6 John. Ch. 353; *Doolittle v. Lewis*, *supra*; *Vroom v. Van Horne*, 10 Pa. 549, 557; *Schulz v. Pulver*, 11 Wend. 361; *Trecothick v. Austin*, 4 Mason, 16, 33; *Stevens v. Gaylord*, 11 Mass. 256; *Nisbet v. Stewart*, 2 Dev. & B. 24; *Parsons v. Lyman*, 20 N. Y. 103, 108. Some of these decisions contain mere *dicta* or intimations on the point under consideration, and are referred to below.

Or if there be no administration in the State of the debtor's domicil. voluntary * payment of a debt to a foreign administrator, or the release of a debt by such, would not be held invalid if there is no administrator in the debtor's domicil interfering;¹ and that in the absence of a domestic administrator payment of debts could only be made to a foreign executor.² The case of *Trecothick v. Austin*, sometimes relied on in support of the view that a foreign executor may sue without probate of the will in the State of the forum, establishes the view of Judge Story, as an *obiter dictum*, that a foreign executor may maintain a suit in his own right, but not in his representative capacity.³ In North Carolina one who paid over the money left by a deceased resident of Georgia, who died while on a visit in North Carolina, to an administrator in Georgia, was held not liable as executor *de son tort* to a Georgia creditor, but the question of liability to a creditor in North Carolina was expressly reserved.⁴ On the other hand, it is held directly and unqualifiedly that payment to a foreign executor or administrator is void, and no defence to the demand of an administrator duly appointed in the State of the debtor's domicil.⁵ On principle, it would seem to result from the limitation of the validity of letters testamentary and of administration to the State or country granting them, that foreign executors and administrators can bind the estate of a decedent to the extent only to which the law under authority of which they act is recognized by the comity of the State in which the property may be found; and such comity may be expressed by act of its legislature, or the decisions of its courts.⁶

Payment to foreign administrator not good against a domestic administrator. * Hence a voluntary payment to a foreign executor or administrator, unless authorized by such comity, is void, and

¹ *Williams v. Storrs*, *supra*; *Vroom v. Van Horne*, *supra*; *Schulz v. Pulver*, 11 Wend. 361; *Citizens' Bank v. Sharp*, 53 Md. 521; *Wilkins v. Ellett*, 108 U. S. 256, 259; *Luce v. Railroad*, 63 N. H. 588, 591; *Schluter v. Bowery Bank*, 117 N. Y. 125; *Bull v. Fuller*, 78 Iowa, 20; and see remarks of Dean, J., in *Shinn's Estate*, 166 Pa. St. 121, 129; *McCully v. Cooper*, 114 Cal. 258, 261. But if a debtor whose property is about to be attached in the State of the domicil of the deceased by the executor, procures, for the purpose of defeating payment there, a collusive appointment of an administrator in a foreign State which is the domicil of the debtor, but not of the deceased, to which foreign administrator he then makes a voluntary payment, this will be no defence to the action by attachment brought by the ex-

ecutor: *Amsden v. Danielson*, 18 R. I. 787. See s. c. 19 R. I. 533.

² *Parsons v. Lyman*, 20 N. Y. 103, 113.

³ 4 Mas. 16, 32. See § 162

⁴ *Nisbet v. Stewart*, 2 Dev. & Bat. 24.

⁵ *Bartlett v. Hyde*, 3 Mo. 490; *Stone v. Scripture*, 4 Lans. 186, reviewing the New York cases, *supra*, up to that time, and holding that the power of an administrator appointed in the domicil of the debtor is exclusive of that of any foreign executor or administrator; *Young v. O'Neal*, 3 Sneed, 55, holding that the payment might be good if made in the State under which the foreign administrator holds his appointment. See also *post*, § 200.

⁶ *Story*, Conf. L., §§ 514, 515 a; *Westl. Pr. Int. L.*, § 296, citing *Whyte v. Rose*, 3 Q. B. (Ad. & E. n. s.) 493; *Reynolds v. McMullen*, 55 Mich. 568, 575.

no defence against the claim of an administrator of the State where the debtor or property is found; but will be good where it does not conflict with such administration.¹

§ 162. **Extra-territorial Validity of Title once vested.** — Where the legal title to the intestate's or testator's chattels has been fully vested in the executor or administrator, it is obvious that he may remove them, or follow them into a foreign jurisdiction without forfeiting or losing this ownership, for "the title to personal property duly acquired by the *lex loci rei sitæ* will be deemed valid and be respected as a lawful and perfect title in every other country."² Hence he and his assignee or vendee may sue for and recover them in a foreign jurisdiction without a grant of new administration there.³ Upon this principle, a foreign executor or administrator may maintain an action on a judgment recovered against the debtor in another State, for such suit need not be brought in the representative capacity of the plaintiff,⁴ as well as on a contract made

Title once acquired follows everywhere.

Test is whether the suit can be brought in the individual capacity.

by the defendant with the foreign executor or administrator [* 367] personally;⁵ and it is not a * fatal objection in such cases

¹ Denny v. Faulkner, 22 Kans. 89, 96, citing several cases above referred to. See cases under §§ 160, 161; and Klein v. French, 57 Miss. 662, 668; McNamara v. McNamara, 62 Ga. 200; Luce v. Railroad, 63 N. H. 588; Putnam v. Pitney, 45 Minn. 242, 246, refusing to issue letters on the ground that the foreign executor could collect all the assets in Minnesota without administration, there being no necessity to bring suit therefor, and no domestic creditors.

² Story, Conf. L., § 516; ante, § 159; Collins v. Bankhead, 1 Strobb. 25. The same principle holds good respecting a liability, which follows the person of the debtor; hence a legacy charged upon real estate devised may be enforced against the devisee (although he be also executor), if he accepted the devise, in any foreign State to which he may remove: Brown v. Knapp, 79 N. Y. 136, 143. So, also, it was held that a foreign administrator in whose State the cause of action accrued may maintain suit for the death of his intestate in another State, on the ground that he sues not in his character of administrator, but rather as trustee of an express trust in favor of the widow and next of kin, to whom the amount recovered would go, it not being assets of the estate: Wilson v. Tootle, 55 Fed. R. 211.

³ Kilpatrick v. Bush, 23 Miss. 199; Purple v. Whithead, 49 Vt. 187; Crawford v. Graves, 15 La. An. 243; Wingate v. Wheat, 6 La. An. 238; Beckham v. Wittkowski, 64 N. C. 464; Commonwealth v. Griffith, 2 Pick. 11. In the latter case it was held that a slave escaped from another State, not being property in Massachusetts, could not be administered upon there; but that if the owner's title had vested in the administrator in the State of the owner's domicile, the latter or his agent might, under the law of Congress, seize and remove the slave without administration in Massachusetts.

⁴ Indeed, a new administrator appointed in the State of the new forum, not being privy to the judgment, could not maintain such action: Talmage v. Chapel, 16 Mass. 71. See Cherry v. Spight, 28 Tex. 503; Biddle v. Wilkins, 1 Pet. 686; Barton v. Higgins, 41 Md. 539; Tittmann v. Thornton, 107 Mo. 500; Hall v. Harrison, 21 Mo. 227; Rucks v. Taylor, 49 Miss. 552, 560; Lewis v. Adams, 70 Cal. 403.

⁵ Lawrence v. Lawrence, 3 Barb. Ch. 71; Barrett v. Barrett, 8 Me. 346; Trotter v. White, 10 Sm. & M. 607; Mowry v. Adams, 14 Mass. 327, 329; Williams v. Moore, 9 Pick. 432, 434.

that the plaintiff described himself as executor or administrator, this being a proper *descriptio personæ*. Where the foreign executor can sue upon such a contract he may be sued upon it; the remedy must run to either party or neither.¹ So an executor may maintain an action for lands devised to him in another State, without qualifying in such State as executor, because in such case he may sue as devisee,² and the executor or administrator holding a note indorsed in blank or payable to bearer may sue thereon, as indorsee or owner;³ and *a fortiori* as payee, where the note is given or payable to him in person; for in such case the full legal title is in the personal representative, and the addition of his official capacity mere description of the person.⁴ So an administrator, to whom a patent was reissued on an invention of his intestate, may maintain an action for the infringement thereof in a State in which he has obtained no letters, because the legal title to such patent is in the administrator as trustee.⁵ For the same reason, the assignee of a chose in action assigned by a foreign executor or administrator may maintain an action on the chose transferred, although the assignor could not bring such suit himself,⁶ on the ground that the disability of the foreign executor or

¹ *Johnson v. Wallis*, 112 N. Y. 230, 232, holding an action to be maintainable against foreign executors to compel specific performance of a contract made by them to assign a judgment belonging to the estate.

² *Lewis v. McFarland*, 9 Cr. 151. But this principle would not hold good in the case of a legatee or heir of personal property, who must derive his title through the executor or administrator, and he derives his authority as such from the *lex loci rei sitæ*: *Partnership Estate of Ames & Co.*, 52 Mo. 290.

³ *Barrett v. Barrett*, *supra*; *Robinson v. Crandall*, 9 Wend. 425; *Klein v. French*, 57 Miss. 662, 671; *Knapp v. Lee*, 42 Mich. 41. It has been held that where a negotiable note matures after the testator's death it becomes vested in the local executor, who may sue upon it in another State without taking out letters there, and establish a vendor's lien in the State where the land is situated, for the purchase of which the note was given: *Giddings v. Green*, 48 Fed. R. 489.

⁴ *Rector v. Langham*, 1 Mo. 568; *Lacombe v. Seargent*, 7 Mo. 351; *Smith v. Monks*, 55 Mo. 106. So where an administratrix insured the intestate's property, situate in the State of the domicile, in a company doing business in another State,

in which administration is also had, the money due on the loss of the property was held payable to the administratrix at the place of domicile: *Abbott v. Miller*, 10 Mo. 141. But when he sues in his representative capacity, alleging title in his testator or intestate, he cannot recover by virtue of his individual interest in the matter in controversy: *Burdyné v. Mackey*, 7 Mo. 374.

⁵ *Goodyear v. Hullihen*, 3 Fisher's Pat. Cas. 251, citing *Woodworth v. Hall*, 1 Woodb. & Min. 248, 254, and *Smith v. Mercer*, 3 Pa. L. J. 529, 531.

⁶ *Campbell v. Brown*, 64 Iowa, 425, citing authorities *pro* and *con*; *Harper v. Butler*, 2 Pet. 239; *Peterson v. Chemical Bank*, 32 N. Y. 21; *Smith v. Tiffany*, 16 Hun, 552; *Leake v. Gilchrist*, 2 Dev. L. 73; *Mackay v. Church*, 15 R. I. 121; *Equitable Life Assur. v. Vogel*, 76 Ala. 441, 447; *Abercrombie v. Stillmann*, 77 Tex. 589; *Salinsky v. National Bank*, 82 Tex. 244 (holding that the assignment of a note draws with it the mortgage appurtenant to it), 246. So it was held in Missouri, that an executrix, who was also residuary legatee, having fully administered in Kentucky, may bring an action in her own right against a debtor of the testator resident of Missouri: *Morton v. Hatch*, 54 Mo. 408. And the assignee of stock by a

administrator to sue does not attach to the subject of the [* 368] action, but to the person of the plaintiff. But this * is true only in cases where the title to the chose has fully attached, and may be asserted without trenching upon the authority of the *forum rei sitæ*; where, for instance, the property of an executor or administrator is wrongfully removed into another State,¹ or where such property is removed *after* due administration thereon. In such case the title of the owner is not affected by any question of administration, and is as full as that of any owner *sui juris*. In general, however, simple contract debts are *bona notabilia* in the State where the debtor resides, and neither an administrator appointed in a foreign State, nor the assignee of such, can control or release them.² So the balance remitted by a foreign executor to his agent in another State, with directions to pay it to a residuary legatee, cannot be claimed by an administrator appointed in such State.³

§ 163. **Statutory Authority of Foreign Executors and Administrators.** — Statutory provisions of many of the States enable foreign executors and administrators, under such conditions and restrictions as may be imposed, to assign, transfer, collect, and sue for the property of their testators and intestates found within the jurisdiction of such States.⁴ It follows

Authority conferred by statutes.

foreign executor may compel the transfer thereof in the courts of the State where the corporation does business: *Middlebrook v. Merchants' Bank*, 3 Abb. App. Dec. 295, affirming same case in 41 Barb. 481; 18 Abb. Pr. 109; 27 How. Pr. 474; *Brown v. San Francisco Co.*, 58 Cal. 426, 428; *Luce v. Railroad*, 63 N. H. 588; *Graham v. Oviatt*, 58 Cal. 428. And it has been held that he may foreclose a mortgage securing a note transferred by a foreign executor: *Gove v. Gove*, 64 N. H. 503; but the contrary has also been held: *McIntire v. Conrad*, 93 Mich. 526, holding that the assignment by a foreign executor of a Michigan mortgage and note is ineffectual, where a power of sale in a mortgage is given to a non-resident and his legal representatives, the latter may execute the power, as it vests in him by the contract, and is not dependent upon the laws of either State relating to administration: *Stevens v. Shannahan*, 160 Ill. 330. And since the executor having letters of probate granted in the testator's domicile is the holder of stock within the meaning of the corporation act, he may vote on such stock standing in the decedent's name in another State: *In re Election*, 51 N. J. L. 78.

¹ *Moore v. Fields*, 42 Pa. St. 467, 472.

² *Post*, §§ 205, 309; *Dial v. Gary*, 14 S. C. 573; *Morton v. Hatch*, *supra*, in which the distinction between the condition of the title before and after completion of the administration is emphasized: *Stearns v. Barnham*, 5 Me. 261; *McCarty v. Hall*, 13 Mo. 480; *Partnership Estate of Henry Ames & Co.*, 52 Mo. 290; *Moore v. Jordan*, 36 Kans. 271, 274. See also *Barnes v. Brashear*, 2 B. Mon. 380, where it is held that the assignment of a note by the executor of a deceased testator properly appointed authorizes the assignee to bring suit upon it in any other State, and that the administrator of the estate in the place of the domicile, who obtained possession of a bond which was in possession of the intestate at the time of his death in another State, was authorized to collect such bond: pp. 383 *et seq.*; *Thompson v. Wilson*, 2 N. H. 291.

³ Because it was money had and received by the agent to the use of the residuary legatee, who was entitled to recover the same: *Wheelock v. Pierce*, 6 Cush. 288.

⁴ *Eells v. Holder*, 2 McCrary, 622; *Bell v. Nichols*, 38 Ala. 678; *Cloud v. Golightly*, 5 Ala. 654; *Glassell v. Wilson*, 4 Wash.

from this authority of foreign executors and administrators, that the Statute of Limitations runs against them just as though they had been appointed in such States.¹ And where the *stat- [*369] ute authorizes them to sue and be sued, in like manner as a non-resident may be sued,² an attachment against such will divests them of all interest in the property attached.³ In Pennsylvania a distinction formerly existed between executors appointed in a sister State and those of foreign countries, and it was held that this law was intended to prevent the withdrawal from the jurisdiction of Pennsylvania of the estates of non-residents, to the prejudice of those interested in the distribution, and to apply to administrators as well as executors;⁴ but now any foreign executor may transfer stock of a company in Pennsylvania.⁵ In some of the States the foreign executor or administrator is permitted to act, but must first qualify according to the laws of such State,⁶ or file his letters testamentary or of administration in the county where he brings suit.⁷ In Wis-

59; *Newton v. Cocke*, 10 Ark. 169; *South Western Railroad v. Paulk*, 24 Ga. 356; *Turner v. Linam*, 55 Ga. 253; *Kansas Pacific Railroad v. Cutter*, 16 Kans. 568; *Sheldon v. Rice*, 30 Mich. 296; *Price v. Morris*, 5 McLean, 4; *Deringer v. Deringer*, 5 Houst. 416; such provisions do not exclude the grant of letters by the local courts, but are cumulative: *Epping v. Robinson*, 21 Fla. 36, 51.

¹ *Manly v. Turnipseed*, 37 Ala. 522; *Bell v. Nichols*, *supra*.

² As in *Kansas*, Gen. St. ch. 37, § 203.

³ *Cady v. Bard*, 21 Kans. 667, 668. In general, however, attachment will not lie against an executor or administrator, though he be a non-resident: *Levy v. Succession*, 38 La. An. 9; *In re Hurd*, 9 Wend. 465; see also *Weyman v. Murdock*, Harp. L. 125.

⁴ *Alfonso's Appeal*, 70 Pa. St. 347.

⁵ *Williams v. Pennsylvania Railroad*, 9 Phila. 298, referring to the statute of 1871, Pamph. L. 44, and holding that it is not incumbent upon the company to ascertain whether the will authorizes such transfer, but the power in the executor will be presumed. The earlier statutes on this subject were regarded with distrust and apprehension by the courts. "The authority of an administrator," says Gibson, C. J., of the Supreme Court of Pennsylvania, "under letters granted in a sister State, to meddle with the assets here, is an anomaly produced by an unexamplified spirit of comity in the courts of

this State, which will probably be attended, in this respect, with perplexity and confusion": *Brodie v. Brickley*, 2 Rawle, 431, 437. See the remarks on this and other Pennsylvania cases in *Shinn's Estate*, 166 Pa. St. 121, in which the court inclines to extend rather than restrict the spirit of comity in that State; and in the later case of *Laughlin v. Solomon*, 180 Pa. St. 177, the court again reviews the cases, and approves the early cases which gave larger recognition to foreign executors, and disapproves *Brodie v. Brickley* and other intermediate cases.

⁶ *Perkins v. Williams*, 2 Root, 462; *Nicole v. Munford*, Kirby, 270; *Hobart v. Turnpike Company*, 15 Conn. 145; *Allsup v. Allsup*, 10 Yerg. 283; *Curle v. Moor*, 1 Dana, 445; *Winter v. Winter*, Walker (Miss.), 211; *Sims v. Hedges*, 65 Miss. 210; *Vermilya v. Beatty*, 6 Barb. 429. These conditions are in effect a requirement to obtain new letters.

⁷ *Mansfield v. Turpin*, 32 Ga. 260; *Naylor v. Moody*, 2 Blackf. 247; *Higgins v. Reed*, 48 Kans. 272 (allowing a foreign executrix to sell realty); *Babcock v. Collins*, 60 Minn. 73, *per* Canty, J., p. 77, referring to the statutes. And in Illinois it is held that, where the transcript of the letters so filed shows that they were granted in a foreign State by the clerk, this will be deemed a ministerial act, and collateral inquiry may be made whether the conditions necessary to give jurisdiction existed: *Illinois Central Railroad v*

consin he may file a copy of his appointment in any county and can then exercise the same powers as a domestic executor or administrator.¹ In Arkansas, administrators and executors appointed in any of the States of the Union may sue in their representative capacity, to the same and like effect as if appointed in Arkansas;² while a judgment obtained against a foreign administrator in this State, upon his voluntary appearance, is held to be void,³ yet if he subsequently file a bill of review to reverse the decree on the ground that he could not be sued in Arkansas, he thereby becomes himself the actor, and under the statute confers jurisdiction on the court to bind him by the original decree, if his bill is dismissed for want of equity.⁴ Where a foreign executor or administrator is entitled to bring suit on condition of obtaining new letters, as in Nebraska, he stands in the same relation to the estate which an executor sustains at common law before probate of the will; he may commence an action before obtaining letters, and take judgment, if he show by subsequent averment that he was duly qualified.⁵ But where a foreign executor attempts to enforce a judgment in favor of his intestate without complying with the statute of the forum, his subsequent qualification in accordance therewith will not relate back so as to validate an unauthorized execution,⁶ and a presentation of a claim by a foreign executrix against the debtor's estate, before complying with the statute clothing foreign executors with authority, is void, and does not put in operation the statute of non-claim.⁷ The authority of a foreign executrix to defend a suit in Kentucky is not extinguished by her marriage; the statute of Kentucky has no bearing upon the authority of a non-resident representative, which is governed by the foreign law.⁸ In this State a non-resident executor or administrator of a non-resident decedent may sue to recover a debt, on giving bond in the county where the action is brought; but if he desires to proceed for any other purpose (as to sell realty under a will) he must take out new letters;⁹ nor is a foreign executor authorized under the statute to sue for a tort.¹⁰ A foreign [* 370] executor selling * land in Indiana is governed by the same rules, terms, and conditions as a domestic executor, except that he is not liable to give bond, if he have given a sufficient bond

Cragin, 71 Ill. 177. And in Iowa the foreign executor must also give bond before he can sue: *Karrick v. Pratt*, 4 Greene (Iowa), 144.

¹ *Murry v. Norwood*, 77 Wis. 405, 408.

² In this State lands are by statute made assets in the hands of an administrator; it is held, that nevertheless a foreign administrator cannot sue for possession of the realty; nor is he liable, as such, for rents and profits: *Fairchild v. Hagel*, 45 Ark. 61.

³ *Greer v. Ferguson*, 46 Ark. 324.

⁴ *Lawrence v. Nelson*, 143 U. S. 215.

⁵ *Swatzel v. Arnold*, 1 Woodw. 383; and see *Gray v. Ferguson*, 86 Mich. 383.

⁶ *Jackson v. Scanland*, 65 Miss. 481.

⁷ *Henry v. Roe*, 83 Tex. 446.

⁸ *Moss v. Rowland*, 3 Bush. 505.

⁹ *Marrett v. Babb*, 91 Ky. 88.

¹⁰ *L. & N. Railroad v. Brantley*, 96 Ky 297.

in the State in which he received his appointment.¹ In Florida foreign executors and administrators are authorized by the statute to bring suits, but not to defend them.² Letters granted in New York have been held to enable a suit to be brought in the District of Columbia,³ and in Minnesota a foreign administrator may be admitted to defend a suit pending against the decedent at his death.⁴ In Georgia a foreign administrator *de bonis non* cannot be substituted for the deceased predecessor as plaintiff in a pending action, but he may maintain a new suit.⁵ Where a testator in Ireland named a person in America as trustee, with power and discretion to collect and transmit his estate in America to his executors in Ireland, the person so named was held to be a limited executor, and bound to execute the trust in the mode prescribed in the will.⁶

§ 164. **Liabilities of Foreign Administrators.**—The principle that executors and administrators are not liable to actions as such in States where they have obtained no letters is not permitted to protect them against the consequences of their own wrong or default. Thus, where an executor or administrator removes the property of the estate in his charge, without having completed the administration, to another State, and fails to obtain new letters of administration there, a court of equity will grant relief to any person whose interest is thereby jeopardized, on the ground that, where a trust fund is in danger of being wasted or misapplied, the court of chancery, on the application of those interested, will interfere to protect the fund from loss.⁷ The exercise of this authority is in no way inconsistent with the general principle announced as governing the powers and liabilities of executors and administrators, who, as such, derive their powers from, and are amenable only to, the forum of the State under whose laws they hold their office. They are in such proceeding treated, not in their official capacity, which is co-extensive only with the State in which they received their appointment, but as persons who, by withdrawing themselves from the * jurisdiction of the court having power over [* 371] them, are unlawfully in possession of the property which is to be protected, or adjudged to its lawful owner. "This is not a suit against the administrator for a debt due from the estate, but it is an assertion of title to the property itself, which, being

¹ Rapp v. Matthias, 35 Ind. 332. And the court's failure to require the foreign executor to file an authenticated copy of the will and of his appointment, is not a jurisdictional defect in a sale of real estate: Bailey v. Rinker, 146 Ind. 129.

² Gordon v. Clark, 10 Fla. 179, 196; Sloan v. Sloan, 21 Fla. 589.

³ Blydenburgh v. Lowry, 4 Cr. C. C.

368; if certified according to 2 St. at Large, 755.

⁴ Brown v. Brown, 35 Minn. 191.

⁵ Patterson v. Blanchard, 98 Ga. 518

⁶ Hunter v. Bryson, 5 G. & J. 483.

⁷ Calhoun v. King, 5 Ala. 523, 525; Beeler v. Dunn, 3 Head, 87, 90; Dillard v. Harris, 2 Tenn. Ch. 196, 206.

found in this State, will give the court jurisdiction.”¹ So an executor may be compelled by a court of equity, in a State to which he may have removed, to disclose with what funds he has purchased property, the character of the funds, and whether he holds the property as trustee, and for what uses and trusts.² In Connecticut it is held that an executor bringing unadministered assets of his testator’s estate into a foreign State is there liable to creditors as executor *de jure*.³ And executors who have been made parties to a suit in a foreign State at their own request will not be heard to deny, in a subsequent suit on such judgment in the State of the domicile, the jurisdiction of such foreign court.⁴ And where an executor obtains letters of administration in another State also, he is liable there for assets obtained in the foreign State before issue of letters to him.⁵ In California it was held that an ancillary administrator there appointed could recover by replevin from the foreign domiciliary administrator temporarily in the State, negotiable paper evidencing debts due the deceased from a local bank, which the foreign administrator was unable to collect.⁶

In Georgia, an administrator, appointed in another State, having converted the assets of the estate and removed to Georgia, was not only held personally liable to the heirs, but also the sureties on his administration bond, who had likewise removed to Georgia.⁷

¹ Ormond, J., in *Calhoun v. King*, *supra*. To the same effect, *Williamson v. Branch Bank*, 7 Ala. 906; *Julian v. Reynolds*, 8 Ala. 680; *Montalvan v. Clover*, 32 Barb. 190; *Patton v. Overton*, 8 Humph. 192; *Tunstall v. Pollard*, 11 Leigh, 1; *Colbert v. Daniel*, 32 Ala. 314; *McNamara v. Dwyer*, 7 Pai. 239; *Allsup v. Allsup*, 10 Yerg. 283; *Bryan v. McGee*, 2 Wash. C. C. 337; *Powell v. Stratton*, 11 Grat. 792; *Manion v. Titworth*, 18 B. Mon. 582, 597, approved in *Baker v. Smith*, 3 Met. (Ky.) 264, holding that the accountability of the administrator must be determined by the law of the State where he qualified; *Spraddling v. Pipkin*, 15 Mo. 118, holding that in such case the remedy is not *detinue* by an administrator *de bonis non* appointed here, but by bill in equity; *Whittaker v. Whittaker*, 10 Lea, 93, 97.

² *Clopton v. Booker*, 27 Ark. 482. In this case it is held that the executor, as such, cannot be called to account before a foreign court.

³ *Marcy v. Marcy*, 32 Conn. 308.

⁴ Upon the ground of estoppel, and also on the principle that where one sues as executor, or, being sued, answers as

such, he is liable as executor *de son tort*: *National Bank v. Lewis*, 12 Utah, 84, 99; *Davis v. Connelly*, 4 B. Mon. 136, 139, *et seq.*

⁵ *Parsons v. Lyman*, 4 Bradf. 268; s. c. 20 N. Y. 103, 108. But where a debtor makes voluntary payment to a foreign executor, who accounts therefor in such foreign State, and subsequently takes out letters in the debtor’s State, the latter cannot then, as a creditor, claim to have him surcharged in his State with the debt so paid: *Gray’s Appeal*, 116 Pa. St. 256.

⁶ *McCully v. Cooper*, 114 Cal. 258.

⁷ *Johnson v. Jackson*, 56 Ga. 326, 328. Warner, C. J., in delivering the opinion, puts this doctrine on the ground that the sovereignty and jurisdiction of the State extend to all persons while within its limits, whether as citizens, denizens, or temporary sojourners, including executors and administrators as well as other persons, no exception being made in favor of sureties on their bonds; the nature and extent of their liability being determined by the laws of the country or State from which they derive their authority, in the same manner as if they were sued in the courts of that State or country. “And that,” he

*It may be stated, however, as a general proposition, that [*372] the liability of an administrator for property fraudulently, or without having been fully administered, brought from the State in which he received his appointment to another State, is to the creditors and distributees alone, and does not authorize the grant of letters in the latter State.¹

§ 165. **Probate Jurisdiction affected by Change of Government.** — A question of some interest in connection with the status of foreign executors and administrators arose out of the exercise of probate jurisdiction by the courts under the governments existing in some of the States during the late rebellion, and the subsequent rehabilitation of the government of the United States. The probate of wills and the appointment of executors and administrators by probate courts holding authority under and commissions from the government of the State of Alabama while a member of the Confederacy were after the war, in the State of Alabama, held to be the acts of a foreign jurisdiction. "It is true," says Peck, C. J., of the Supreme Court, delivering the opinion in *Bibb v. Avery*, "there seems to be an apparent incongruity in this view of the case, arising from the fact that the rebel State government had the same name, and was in possession of the same geographical territory, as the legitimate government of the State of Alabama before and since the rebellion, and the people were the same people; but this apparent incongruity disappears when we look to principles and not to names. For we know that the rebel State of Alabama, not rightfully, but in fact, was in all its essentials, its sovereignty, dominion, and government, as utterly foreign to the United States as the government of Canada or of San Domingo; consequently, the judgments of its courts and judicial acts can be treated as having no greater legal effect than the judgments and judicial acts of a recognized foreign government."² *In [*373] Arkansas it was held that letters of administration issued by the clerk of the probate court, holding a commission from the Governor of Arkansas under the Confederate Constitution of 1861, were void, and conferred no authority in 1867, because the clerk was not, at the time of granting the letters, in March 1864, an officer of the

says, "is the comity of States as recognized by the . . . Code." It is to be noticed, however, that the facts recited in the opinion bring the case fully within the general rule as stated in the text.

¹ *McCabe v. Lewis*, 76 Mo. 296, 304.

² 45 Ala. 691, 693, *et seq.* It was accordingly held in this case, that executors holding letters testamentary issued "by a probate court of the rebel State government of Alabama" before the judge of

said court had taken the oath of amnesty and of office required by the Governor's proclamation of July 20, 1865, were required to obtain new letters, and give new bonds and security, before they could maintain an action in the courts of that State; but that, under the peculiar circumstances of the case, the new letters so issued must be regarded, not as ancillary, but as original.

government of the State of Arkansas.¹ But an action commenced by an executor appointed during the war may be continued by such executor in his own name under authority of new letters granted after the war by the proper probate court of the existing government.² So in Texas it was held that the military courts established by the federal authority during the reconstruction period were the proper legal authority until the dominant power holding military possession determined that the military rule, called for by the secession of the State, should be at an end; and since this was not done before April 16, 1870, the constitution of 1869, adopted by the people of Texas and withdrawing probate jurisdiction from the county courts, could not have the effect of working a cessation of probate jurisdiction in those courts until April 16th, 1870; and it was accordingly held that a probate sale, made and approved in 1870, prior to April 16th in a county court, was valid to pass the title.³

A similar question was presented in consequence of the cession of a part of their territories by the States of Virginia and Maryland to the government of the United States to form the District of Columbia, which led to the decision that letters of administration granted in Maryland before the cession of the territory have no validity in the district ceded after the separation, and that the administrator must obtain new letters there.⁴ But an administrator who had been appointed in Virginia before the separation could not, in a suit against him in the District of Columbia after the separation, sustain the plea of "never administrator."⁵ And in Kentucky it was held that the probate of a will in Virginia before the separation of Kentucky from its territory was not a foreign probate, but that the will so proved was admissible in evidence as a will proved in Kentucky after the separation.⁶

§ 166. **Procedure governed by the Law of the Forum.** — Although the law of the domicile of the decedent governs the devolution of personal property to heirs and legatees, yet it follows from the exclusive authority of each nation over the property and persons within its jurisdiction, that the mode of administration, including the method of proving debts, their right to priority of payment, and the marshalling of assets for this purpose, is gov-
[* 374] erned * altogether by the law of the country in which the executor or administrator acts, entirely independent of that in the domicile of the decedent, or in any other State.⁷ This

Rules of administration, priority of debts and method of proving them, are governed by the law of the forum.

¹ Page v. Cook, 26 Ark. 122.

² Gilmer v. Purgason, 50 Ala. 370.

³ Daniel v. Hutchison, 86 Tex. 51.

⁴ Fenwick v. Sears, 1 Cranch, 259.

⁵ Courtney v. Hunter, 1 Cr. C. C. 265.

⁶ Morgan v. Gaines, 3 A. K. Marsh.

613; Gray v. Patton, 2 B. Monr. 12.

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⁷ Story, Confli. L. §§ 524, 525; Smith v. Union Bank of Georgetown, 5 Pet. 518, 526: "Every sovereign has his own code of administration, varying to infinity as to the order of paying debts, and almost without an exception asserting the right to be himself first paid out of the assets.

principle is recognized in the federal as well as in the State courts. Thus, a creditor obtaining a judgment in a district court of the United States was held not entitled to an execution thereon against the administrator of an intestate's estate declared insolvent by the probate court, although the judgment had been obtained before the estate was declared insolvent, on the ground that the jurisdiction of the probate court had attached to the assets.¹ When the United States comes into the probate court its claim will be governed by the local law.² That an executor or administrator is not liable in the State where he received his appointment for assets received in another State, whether he obtained additional letters there or not, has already been shown.³ The cases holding a contrary doctrine,⁴ in so far as they are not based upon the principle that the assets were *wrongfully* removed from the State or country having jurisdiction for the purpose or with the effect of defeating such jurisdiction, seem to be inconsistent with the general doctrine on this subject, and are said by Judge Story to be very difficult to be supported.⁵

* § 167. Payment of Debts and Distribution to Non-resi- [* 375]

Debts proved
by domestic
creditors and
expenses of

dents. — From these principles it results that the administration of the assets of a deceased person is conducted according to the laws of the State in which they

And the obligation in the administrator to conform to such laws is very generally enforced, not only by a bond, but by an oath, both of which must rest for their efficiency on the laws of the State which requires them." *Kennedy v. Kennedy*, 8 Ala. 391; *McGehee v. Polk*, 24 Ga. 406; *Hooker v. Olmstead*, 6 Pick. 481; *St. Jurjo v. Duncomb*, 2 Bradf. 105; *Isham v. Gibbons*, 1 Bradf. 69; *Willing v. Perot*, 5 Rawle, 264; *Goodall v. Marshall*, 11 N. H. 88; *Dixon v. Ramsay*, 3 Cr. 319; *Trecothick v. Austin*, 4 Mas. 16.

¹ "They are *in gremio legis*," says Grier, J. "But we wish it to be understood that we do not express any opinion as to the right of State legislation to compel foreign creditors in all cases to seek their remedy against the estates of decedents in the State courts alone, to the exclusion of the jurisdiction of the courts of the United States": *Williams v. Benedict*, 8 How. 107, 112. In later cases, it was held that a foreign creditor may establish his debt in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent estates, and that the court will interpose to arrest the distribu-

tion of *any surplus* among the heirs, reserving, however, the question whether or what steps may be taken to secure equality of such creditors in the distribution of the assets independently of the administration in the probate courts: *Green v. Creighton*, 23 How. (U. S.) 90, 107, *et seq.*; *Union Bank of Tennessee v. Jolly*, 18 How. 503. For a fuller discussion of the extent to which federal courts can take jurisdiction in administration matters, see *ante*, § 156.

² *United States v. Hailey*, 2 Idaho, 26, 30.

³ *Ante*, § 160, and authorities.

⁴ *Swearingen v. Pendleton*, 4 S. & R. 389, 392, and *Evans v. Tatem*, 9 S. & R. 252, 259, both overruled in *Magraw v. Irwin*, 87 Pa. St. 139, 142; *Bryan v. McGee*, 2 Wash. C. C. 337; *Campbell v. Tousey*, 7 Cow. 64.

⁵ *Story*, Conf. L. § 514 *a*, citing with approval *Fay v. Haven*, 3 Met. (Mass.) 109; *Selectmen v. Boylston*, 2 Mass. 384; *Goodwin v. Jones*, 3 Mass. 514; *Davis v. Estey*, 8 Pick. 475; *Dawes v. Head*, 3 Pick. 128; *Doolittle v. Lewis*, 7 John. Ch. 45; *McRae v. McRae*, 11 La. 571; and quoting largely from the opinions in 2 and 3 Mass. and 7 John., *supra*.

may be found, and applied first to the payment of the expenses of administration,¹ and such debts as may be proved against the estate by creditors residing there;² and if there be legatees or heirs there also, their claims will be determined according to the law of the decedent's domicile, and distributed to them. The residue may then be remitted from the ancillary to the domiciliary executor or administrator.³ But it is not obligatory upon courts to transfer the assets to the domicile for distribution; in their judicial discretion, to be guided by the circumstances of each particular case, they may be thus remitted,⁴ or ordered to be distributed by the ancillary administrator to the parties in interest seeking their remedy there.⁵

administration are first paid out of the funds in the hands of the administrator in the State of the forum.

Residue is then transmitted to domiciliary administrator,

or distributed by the court without such transmission.

¹ In Georgia it is held that the year's support of the widow of an intestate is by statute declared to be a part of the necessary expenses of administration, but that the amount thereof is to be ascertained by the law of the domicile of the intestate at the time of his death, and not by the law of the forum before which the administration is pending: *Mitchell v. Word*, 64 Ga. 208, 218. A dissenting opinion by Jackson, J., held that the expenses of administration are regulated by the law of the forum; p. 219.

² *Cowden v. Jacobson*, 165 Mass. 240. Says the court, in *Smith v. Howard*, 86 Me. 203, 207: "So long as there are creditors within the jurisdiction of the ancillary administration, they have a legal right to insist upon having all the assets found there appropriated to pay their debts. The court . . . has no jurisdiction to determine that there are no unpaid creditors here until the expiration of the time fixed by law for presenting their claims." This statement is substantially a quotation from the case cited by the court: *Newell v. Pearlee*, 151 Mass. 601, which holds void as to unpaid creditors an order to transmit funds to the domicile before the expiration of the time to prove debts.

³ *Harvey v. Richards*, 1 Mas. 381, 413; *Spradling v. Pipkin*, 15 Mo. 118; *Parker, C. J.*, in *Dawes v. Head*, 3 Pick. 128, 144; *Dawes v. Boylston*, 9 Mass. 337; *Mordecai v. Boylan*, 6 Jones Eq. 365, holding that it was the duty of the ancillary executor to distribute the legacies to the resident legatees *pro rata*, if there is not a sufficiency of assets in his hands to pay

them in full; *Jones v. Jones*, 39 S. C. 247, 256; *Richards v. Dutch*, 8 Mass. 506; *Fay v. Haven*, 3 Met. (Mass.) 109; *Stevens v. Gaylord*, 11 Mass. 256; *Childress v. Bennett*, 10 Ala. 751; *Perkins v. Stone*, 18 Conn. 270; *Adams v. Adams*, 11 B. Mon. 77; *Stokely's Estate*, 19 Pa. St. 476, 482; *Gibson v. Dowell*, 42 Ark. 164; *Moore v. Jordan*, 36 Kans. 271, 275; *Gable's Estate*, 79 Iowa, 178, in which case the residue consisted of the proceeds of realty; *Hayes v. Pratt*, 147 U. S. 557, 570.

⁴ *Gaines' Succession*, 46 La. An. 252; *Gravillon v. Richard*, 13 La. 293.

⁵ *Cassily v. Meyer*, 4 Md. 1, 7, *et seq.*; *Williams v. Williams*, 5 Md. 467; *Mourrain v. Poydras*, 6 La. An. 151; *Gilechrist v. Cannon*, 1 Coldw. 581; *Porter v. Heydock*, 6 Vt. 374; *Fretwell v. McLemore*, 52 Ala. 124; *In re Hughes*, 95 N. Y. 55; *Damert v. Osborn*, 140 N. Y. 30; *Young v. Wittenmyre*, 22 Ill. App. 496; *Nelson and Curtis, JJ.*, in *Mackey v. Cox*, 18 How. (U. S.) 100, 105; *Welch v. Adams*, 152 Mass. 74; *Carmichael v. Ray*, 5 Ired. Eq. 365, holding that the administrator of the domicile can maintain no action against an ancillary administrator for a surplus in his hands after paying debts; *Churchill v. Boyden*, 17 Vt. 319; *Adlum's Estate*, 5 Phila. 347; *Parker's Appeal*, 61 Pa. St. 478; *Wright v. Phillips*, 56 Ala. 69, 82; *Despard v. Churchill*, 53 N. Y. 192, 200; *Trimble v. Dzieduzyiki*, 57 How. Pr. 208, 213. In *Brown v. Brown*, 1 Barb. Ch. 189, 218, the Chancellor suggests that, "as a question of expediency, certainly, those who have claims upon an estate ought to be compelled to resort to the

Where the estate administered on in more than one State [376] or country is fully solvent, the rule referred to is of easy application, and there seems to be no occasion to doubt the correctness of the principle. "For," says Parker, C. J., of the Supreme Judicial Court of Massachusetts, "it would be but an idle show of courtesy to order the proceeds of an estate to be sent to a foreign country, the province of Bengal, for instance, and oblige our citizens to go or send there for their debts, when no possible prejudice could arise to the estate, or those interested in it, by causing them to be paid here;¹ and possibly the same remark may be applicable to legacies payable to legatees living here, unless the circumstances of the estate should require the funds to be sent abroad."² But with reference to effects collected by an ancillary administrator of an insolvent estate the question is more difficult. "We cannot think, however," says the same learned judge, "that in any civilized country advantage ought to be taken of the accidental circumstance of property being found within its territory, which may be reduced to possession by the aid of its courts and laws, to sequester the whole for the use of its own subjects or citizens, where it shall be known that all the estate and effects of the deceased are insufficient to pay his just debts. . . . Creditors of all countries have the same right as our citizens to prove their claims and share in the distribution."³ But to send the effects of an insolvent estate to the domiciliary administrator, to be the reapportioned among all the *creditors according to the laws of the State of the [* 377] domicile would work equal injustice and greater inconveni-

courts of the country where the decedent was domiciled, and where the personal representatives of his estate were appointed; especially where the claimants are not creditors, but stand in the characters of legatees or distributees of the decedent." *Graveley v. Graveley*, 25 S. C. 1, 21, holding that, as a general rule, legatees go to the administration of the domicile, but that "courts of the ancillary jurisdiction have the right to order the payment of a legacy or the distribution of funds to residuary legatees, or under the statute of the domicile, whenever it appears as matter of fact that there are funds of the estate in the hands of the ancillary jurisdiction; unless for some purpose the equities of the parties require that the funds be sent to the domicile for distribution." *Welles' Estate*, 161 Pa. St. 218, holding that there is a well-recognized exception to the general rule requiring the surplusage of personalty to be remitted to the domicile for distribution,

where there are parties in the ancillary jurisdiction entitled to share in the property, and no domiciliary creditors.

¹ Creditors having the same domicile with the deceased will not be allowed to prove their claims against the fund of the ancillary administration, but must resort to that of the domicile: *Barry's Appeal*, 88 Pa. St. 131, 133; *Churchill v. Boyden*, 17 Vt. 319; especially when the equities are against such claim, and the creditor has neglected to prove up his claim in the domicile until it is too late: *Durston v. Pollack*, 91 Iowa, 668. And when permitted by statute to do so, and the estate is insolvent in both States, they will not be allowed to prove up their claims against the ancillary administration, when they have already received a larger percentage than the creditors of the latter: *Hays v. Cecil*, 16 Lea, 160.

² *Dawes v. Head*, 3 Pick. 128, 144, *et seq.*; *In re Hughes*, 95 N. Y. 55.

³ *Dawes v. Head*, 3 Pick. 145 *et seq.*

ence to the creditors in the State of the ancillary administration, "whose debts might not be large enough to bear the expense of proving and collecting them abroad; and in countries where there is no provision for equal distribution, the pursuit of them might be wholly fruitless. As in Great Britain, our citizens, whose debts would generally be upon simple contracts, would be postponed to creditors by judgment, bond, etc., and even to other debts upon simple contract which might be preferred by the executor or administrator. It would seem too great a stretch of courtesy to require the effects to be sent home, and our citizens to pursue them under such disadvantages."¹ To avoid the injustice and inconvenience attendant upon either course, Chief Justice Parker suggested the rule, now adopted by courts in some States and in some enacted by statute,² to retain the funds in the State of the ancillary administration for a *pro rata* distribution according to the laws thereof among its citizens, having regard to all the assets in the hands of the principal as well as of the auxiliary administrator, and also to all of the debts which by the laws of either country are payable out of the decedent's estate, without regard to any preference which may be given to one species of debt over another, considering the funds in each State as applicable, first, to the payment of the just proportion due to its citizens, and, if there be any residue, that should be remitted to the principal administrator, to be dealt with according to the laws of his country.³ The learned judge, in his exhaustive review of the subject under consideration, points out some difficulties attending the practical application of this rule, and suggests how they may be met; but even the comprehensive powers of a court of chancery, to which he refers the solution of all difficulties which probate courts are impotent to surmount, would seem inadequate to meet all complications that [* 378] might arise, unless the *spirit of comity which he ascribes to the courts should also lead our legislatures to come to their aid by proper statutory enactments.⁴

¹ Ib. 146. Where a foreign creditor asks for a dividend of a decedent's estate, he must take it subject to the priorities established by the law of the forum: *Miller's Estate*, 3 Rawle, 312, 320; *Holmes v. Remsen*, 20 John. 229, 265.

² So in Missouri: *Rev. St. 1889*, §§ 261-274; *Massachusetts Gen. St. 1860*, p. 508; *Vermont: Prentiss v. Van Ness*, 31 Vt. 95, 100.

³ *Dawes v. Head*, 3 Pick. 128, 146, *et seq.*; *Davis v. Estey*, 8 Pick. 475; *Harvey v. Richards*, 1 Mas. 381, 421; *Churchill v. Boyden*, 17 Vt. 319; *Lawrence v. Elmen-dorf*, 5 Barb. 73; *Hays v. Cecil*, 16 Lea, 160.

⁴ An illustration of some of the difficulties attending the application of this rule, which is enacted by statute in Missouri, came within the personal experience of the writer. Debts to a considerable amount were proved against the ancillary administrator in Missouri of an intestate domiciled in Tennessee, in excess of the assets under administration in Missouri. The estate in the domiciliary jurisdiction was also represented as insolvent. To determine the rate of payment to which Missouri creditors were entitled, it was necessary to ascertain the amount of assets in the hands of the domiciliary admin-

Non-resident creditors of an insolvent estate may, in some States, prove their claims against the ancillary administration and subject the real estate of the intestate to their payment, without showing that the personal property of the estate in the State of the domicile has been exhausted.¹ *A fortiori* may resident creditors do this in case of a solvent estate.²

§ 168. **Real Estate governed by the *Lex Rei Sitæ*.** — It is a rule conditioned by imperative necessity, that immovable property should be governed, especially in respect of its transmission, by the law of the country in which it is situated.³ For this reason the execution and probate of a will must conform strictly to the law of the State in which land is therein devised,⁴ and this law is also to govern "as to the capacity of the testator" and "the extent of his power to dispose of the property."⁵ So the descent and heirship of real estate are exclusively governed by the law of the country within which it is actually situate.

No person can take, except those who are recognized *as legitimate heirs by the laws of that country; and they [*379] take in the proportions and in the order which these laws prescribe.⁶ All the authorities, both in England and America, so far as they go, recognize the principle in its fullest import, that real estate, or immovable property, is exclusively subject to the laws of the country within whose territory it is situate.⁷ The reason of the rule includes leasehold and chattel interests in land,⁸ servitudes and

istrator, as well as the amount of debts proved there, which the ancillary administrator was unable to report for a number of years, during all of which time the Missouri creditors were deprived of the money rightfully belonging to them. Again, under the law of Missouri, the demands against estates of deceased persons are divided into six classes, the first five of which must be proved during the first year, and each of which is entitled to payment in full before any of the funds are applied to the payment of the next class. It so happened that the largest debt was proved during the second year of administration, and was therefore placed in the sixth class; and although by reason of its magnitude it secured in the adjustment between the creditors of the two States a sufficient amount for the payment in full of the Missouri creditors of the first four classes, and nearly in full of the fifth class, yet the sixth-class creditor received nothing.

¹ *Rosenthal v. Renick*, 44 Ill. 202, 207

² See authorities *post*, § 470, p. *1042.

³ See Whart. Conf. L., § 560; Story, Conf. L., § 483; Westl. Pr. Int. L., § 146; *McCormick v. Sullivant*, 10 Wheat. 192, 202; *United States v. Fox*, 104 U. S. 315, 320.

⁴ As to the probate and validity of foreign wills, see *post*, § 226; *Kerr v. Moon*, 9 Wheat. 565, 572.

⁵ Story, Conf. L., § 474; *Applegate v. Smith*, 31 Mo. 166, 169; *Washburn v. Van Steenwyk*, 32 Minn. 336, 347.

⁶ Story, Conf. L., § 483; *Lingen v. Lingen*, 45 Ala. 412.

⁷ See collection of authorities by Mr. Justice Miller, in *Brine v. Insurance Co.*, 96 U. S. 627, 635, *et seq.*

⁸ Story, Conf. L., § 447, note (a), citing *Freke v. Carbery*, L. R. 16 Eq. 461; In *Goods of Gentili*, Ir. R. 9 Eq. 541. But in New York a leasehold has been held to be personal property, and as such, as to its transmission by last will, controlled by the law which governed the person of the owner: *Despard v. Churchill*, 53 N. Y. 192, 198, *et seq.*

easements, and other charges on lands, as mortgages and rents, and trust estates; all of these are deemed to be, in the sense of the law, immovables and governed by the *lex rei sitæ*.¹ And as to what constitutes immovable or real property resort must also be had to the *lex loci rei sitæ*.²

Including leaseholds, and chattel interests generally, servitudes, and easements.

In Mississippi the statute provides that not only real estate, but "all personal property situated in this State shall descend and be distributed according to the laws of this State."³ Under this statute it is held that money in a bank in the State of Mississippi, and a note secured by real estate there, are not included, if the deposit certificate and book and the note are found at the foreign domicile of the intestate who has no creditors, heirs, or property in this State, and the domiciliary court orders distribution;⁴ but choses in action held by an agent in this State for an owner domiciled in another State, taken in the course of business of lending money in this State, must be distributed under its laws.⁵

In Mississippi all estate passes under the law of that State.

§ 169. **Provisional Alimony of Widow and Minor Children.**—It appears from what has been stated in an earlier chapter,⁶ that a non-resident widow is in some States allowed a certain portion of the estate of her deceased husband to protect her and her minor children from want and privation,⁷ while this is denied to [* 380] *non-residents in others.⁸ It seems, on principle, that the statutes made for the protection of the family against the suffering and destitution threatening them on the decease of their natural protector should be construed so as to accomplish their purpose. Hence the widow should be entitled to avail herself of such a law if in force in the place of her residence, although her husband was domiciled in another State. But while the law of the decedent's domicile must govern as to the distribution, descent, or testamentary disposition of personal property to the widow or minor children, it seems clear that the law of the forum must determine the relief against destitution and distress of resident families.⁹

¹ Story, Conf. L., § 447; Knox v. Jones, 47 N. Y. 389, 395.

² Chapman v. Robertson, 6 Pai. 627, 630.

³ Miss. Ann. Code, 1892, § 1542.

⁴ Speed v. Kelly, 59 Miss. 47, 50.

⁵ Jahier v. Rascoe, 62 Miss. 699, 703.

It is otherwise where the evidence of debt (as an insurance policy, for instance) is simply left on deposit, and not incident to a business conducted in Mississippi, the

debtor and decedent being both non-residents: Mayo v. Assur. Soc., 71 Miss. 590.

⁶ Ante, § 89.

⁷ New York, Georgia, and Louisiana are there mentioned.

⁸ See the States referred to ante, § 89.

⁹ Platt's Appeal, 80 Pa. St. 501; dissenting opinion of Jackson, J., in Mitchell v. Word, 64 Ga. 208, 219; Whart. Conf. L., §§ 189, 791.

OF THE OFFICE OF EXECUTORS AND ADMINISTRATORS.

CHAPTER XVIII.

NATURE OF THE TITLE VESTING IN EXECUTORS AND ADMINISTRATORS.

§ 170. **Conduit of the Inheritance.**— Under the ancient Roman law the *suus hæres* succeeded to the inheritance immediately upon the death of the ancestor, without any act of his own;¹ and he, as well as the *hæres necessarius*,² was legally bound by all the debts of the deceased, neither of them having the right to renounce the inheritance.³ A different doctrine prevails in England, and generally in the United States. The *damnosa hæreditas* of debts, resting under the Roman law upon heirs, whether *a testato* or *ab intestato*, is by our system limited to the assets. The real estate descends to the heirs and devisees, subject to the power of the executor or administrator to convert the same into *per- [* 382] sonalty for the payment of the decedent's debts; the real or personal property set apart for the widow and minor children goes to them absolutely, and the personal property goes to the executor or administrator to be distributed, after payment of debts, to

¹ Sandar's Inst. Just. 365; citing Dig. xxxviii. 16, 14.

² A slave instituted heir of his master by testament, and called *hæres necessarius* because, whether he wished it or not, he became instantly free by the death of the testator, and thereby the necessary heir: Sand. Just. 309. The practice of enfranchising slaves owed its origin to the great stigma which the sale of a deceased person's effects for the payment of his debts cast upon his memory. Since under a Roman testament the instituted heir assumed all the liabilities of the testator, it was not likely that any one would accept

the heirship if his debts were suspected to exceed the value of the estate; but a slave could not refuse to take upon himself the office, so that, if instituted heir, the goods would be sold, not in the name of the deceased debtor, but in that of the emancipated slave: Ib. 103.

³ By later changes in the law this hardship was removed. It is provided in Justinian's Institutes that heirs may enter upon their inheritance and not be liable for debts beyond the value of the estate, by claiming what commentators call the *beneficium inventarii*: Sand. Just. 315, 316, citing Gai. ii. 163, c. vi. 30, 22.

legatees or next of kin.¹ It will now be proper to inquire into the nature and extent of the authority conferred upon the officers employed by the law to give effect to the will of a decedent in respect of his property,² and whose function it is to personate the deceased in all matters touching the posthumous disposition of his affairs.³

§ 171. **Distinction between Executors and Administrators.** — The functions, powers, liabilities, rights, and duties of executors are in most respects identical with those of administrators. The legislature of Iowa explained by statute that "the term 'executor' includes an administrator, where the subject-matter applies to an administrator;"⁴ and that the word "executor," as used in the title concerning estates of decedents, is intended to be applied to the persons who administer upon the estate of one deceased, whether appointed by the will or otherwise.⁵ An executor has power, generally, to administer all the property of the deceased, although a part of it may not have been bequeathed.⁶ But however great the similarity between the two offices may be, there are some essential distinctions which cannot be ignored or abolished even by legislation, without a change in the law of administration so radical as to be improbable, at least for many years to come.⁷

The decisive difference between them arises out of the method of their appointment: executors represent their testators by virtue of the act of the testator himself, while the authority of the administrator is derived exclusively from the
 [* 383] appointment by some competent court. "An * executor can derive his office from a testamentary appointment only;"⁸ the administrator, on the other hand, derives his authority

Distinction between executors and administrators.

¹ Mr. Wharton, in his able treatise on the Conflict of Laws, states the doctrine thus: "The law says, 'We recognize you as in your own persons the successors of your deceased ancestor. But, in order to prevent conflict and promote speed, we appoint a public officer who is to see that the claims of third parties are properly settled, at the period when this new devolution of the estate commences. This officer, on the principle of *universal* succession, represents your ancestor until his debts are paid and the plan of distribution settled. But at once, on the principle of *singular* succession, the real estate and exempted personalty go to you.'" Conf. L., § 552.

² *Ante*, § 10.

³ *Ante*, § 136.

⁴ Code, 1886, § 45, par. 21.

⁵ Laws, 1860, § 2333.

⁶ *Post*, § 229 and cases cited.

⁷ The author of the Iowa Digest complains that this "peculiarity" was copied into the Revision of 1860 and the Code of 1873, and says that "this statutory innovation in the language of the law is without any perceived benefit, and attended with some inconveniences." 1 Withrow & Styles, Dig. 1874, p. 510.

⁸ Wms. Ex. [239], citing Wentw. Ex. p. 3: "Hence it followeth necessarily that a will is the only bed where an executor can be begotten or conceived; for where no will is there can be no executor; and this is so conspicuous and evident to every low capacity that it needs no proof or illustration." Hartnett v. Wandell, 60 N. Y. 346, 350. But the testator may exercise his power of appointment after his death by an agent appointed in the will. See cases cited *post*, § 229, p. * 503.

wholly from the probate court; he has none until letters of administration are granted.¹ From this distinction important questions frequently arise with regard to the time when the authority or liability of the one or other originated, which will be more fully considered hereafter.²

An important distinction exists also in respect of the power to hold, manage, and alienate the property of the deceased: the authority of the administrator is commensurate with the provisions of the law on the subject, as existing and recognized in the forum of his appointment; but the will of the testator is in itself a law to the executor, which may enlarge or circumscribe the authority or discretion which an administrator would have, and which, to the extent in which it is not repugnant to the law of the State, he must strictly observe.³

§ 172. **When the Title vests in the Executor, and when in the Administrator.**—An executor is a person appointed by a testator

<p>At common law title of executor vests on testator's death,</p> <p>and in the administrator from grant of letters.</p>	<p>to carry out the directions and requests in his will, and to dispose of the property according to his testamentary provisions after his decease.⁴ As his interest in the estate of the deceased is derived from the will, it vests, according to the common law, from the moment of the testator's death.⁵ The will becomes operative, including the appointment of the executor, not by the probate thereof, nor by the act of the executor in qualifying, which are said to be mere ceremonies of authentication, but by the death of the testator.⁶ On the other hand, an administrator is one to whom the goods and * effects [*384] of a person dying intestate, or without appointing an executor who survives and accepts the office, are committed by the probate court.⁷ Deriving his authority wholly from his appointment by the court, his title to the property of the deceased vests in him only from the time of the grant.⁸</p>
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In respect of executors, however, the common law has been materially modified in many of the States, and the doctrine that their

¹ Wms. Ex. [630]. If the court appointing had no jurisdiction, the acts of the administrator are void, and may be collaterally impeached: *Unknown Heirs v. Baker*, 23 Ill. 484; *Terry's Appeal*, 67 Conn. 181.

² *Post*, §§ 185, 186, 187.

³ Thus, if a trust be created in a will and no trustee named, it is incumbent upon the executor (or upon any person who may become by law intrusted with the execution of the will) to carry out the trust: *Saunderson v. Stearns*, 6 Mass. 37, 39; *Dorr v. Wainwright*, 13 Pick. 328, 331;

Groton v. Ruggles, 17 Me. 137; *Scott v. West*, 63 Wis. 529, 558, and authorities cited.

⁴ Whart. Law Lex., "Executor."

⁵ Wms. Ex. [629], [293].

⁶ *Wankford v. Wankford*, 1 Salk. 299; *Graysbrook v. Fox*, 1 Plowd. R. 275, 277 a.; *Johnes v. Jackson*, 67 Conn. 81, 88; *Thiefes v. Mason*, 55 N. J. Eq. 456.

⁷ Whart. Law Lex., "Administrator."

⁸ Wms. Ex. [630]; *Woolley v. Clark*, 5 B. & Ald. 744, 745; *Rand v. Hubbard*, 4 Met. (Mass.), 252, 256.

powers are conferred directly by the will is mostly repudiated. "The fact that one is named in the will as executor does not, as at common law, make him executor in fact, but only gives him the right to become executor upon complying with the conditions required by law."¹ "At death, a man's property really passes into the hands of the law for administration, as much when he dies testate as when he dies intestate; except that, in the former case, he fixes the law of its distribution after payment of his debts, and usually appoints the persons who are to execute his will. But even this appointment is only provisional, and requires to be approved by the law before it is complete; and therefore the title to the office of executor is derived rather from the law than the will."² Most States announce this doctrine, among which may be mentioned Alabama,³ Arkansas,⁴ Georgia,⁵ Kentucky,⁶ Louisiana,⁷ Maine,⁸ Massachusetts,⁹ [* 385] Missouri,¹⁰ New Hampshire,¹¹ New York,¹² * Pennsylvania,¹³

¹ Bliss, J., in *Stagg v. Green*, 47 Mo. 500, 501.

² *Shoenberger v. Lancaster*, 28 Pa. St. 459, 466.

³ *Gardner v. Gantt*, 19 Ala. 666; *Wood v. Cosby*, 76 Ala. 557.

⁴ *Diamond v. Shell*, 15 Ark. 26.

⁵ *Echols v. Barrett*, 6 Ga. 443.

⁶ *Carter v. Carter*, 10 B. Mon. 327, 330.

⁷ *Succession of Vogel*, 20 La. An. 81.

⁸ *McKeen v. Frost*, 46 Me. 239; but see *Hathorn v. Eaton*, 70 Me. 219.

⁹ *Dublin v. Chadbourn*, 16 Mass. 433, 441; *Rand v. Hubbard*, 4 Met. (Mass.) 252, 257.

¹⁰ *Stagg v. Green*, *supra*. Judge Bond, in speaking for the St. Louis Court of Appeals, after discussing the Missouri statute and cases, thus announces the law in *Bambrick v. Webster Groves Association* (53 Mo. App. 225, 236): "The law is therefore: *First*, That an executrix, before taking out letters, may do all and any acts which the necessities of the trust estate and its preservation require, and that any liabilities so incurred by the executrix become, after her qualification as such, enforceable against the estate of the testator. *Second*, That after taking out letters an executrix may, until the succeeding term of the probate court, do any and all acts necessary to prevent material loss to the estate and to accom-

plish the objects pointed out in the statute, such as completing unfinished work," etc.

¹¹ *Tappan v. Tappan*, 30 N. H. 50, 69. But in a subsequent case, *Shirley v. Healds*, 34 N. H. 407, 410, the common-law rule is relied on, and authorities cited by the Supreme Court of New Hampshire in support of its validity. Neither of the cases is binding upon the question under consideration further than that in the former it is held that an executor has no authority to maintain an action before probate of the will, and in the latter that it is his duty to propound the will for probate, unless he refuse the trust, and he may appeal from the decree of the probate court disallowing, rejecting, or refusing probate thereof, basing the reason for such right to appeal upon his title to the personal estate of the deceased under the will, according to the common-law rule.

¹² *Bellinger v. Ford*, 21 Barb. 311, 315. Probate and letters testamentary remove the statutory prohibition against disposing of the property, or interfering with it except for its preservation, but in other respects the rights and powers of the executor are the same before as after, though in some respects held in abeyance by the statute: *People v. Barker*, 150 N. Y. 52, 58.

¹³ *Shoenberger v. Lancaster Savings Institution*, *supra*.

Rhode Island,¹ South Carolina, Tennessee,² Texas,³ Vermont,⁴ and Virginia.⁵

§ 173. **Relation of the Appointment to the Time of the Testator's or Intestate's Death.**—For particular purposes the letters of administration relate back to the time of the death of the intestate,⁶ and vest the property in the administrator from that time,⁷ attaching to property coming from a foreign jurisdiction as soon as it comes into that of the domicil.⁸ On this principle, an administrator may maintain trespass for injuries to the goods of the intestate committed after his death and before the appointment;⁹ or trover for property so wrongfully detained;¹⁰ or an action on a contract made with the defendant before appointment;¹¹ or for money belonging to the estate collected by defendant before grant of letters;¹² or assumpsit for money paid to defendant's order.¹³ And on the same principle, the heirs have no power, before the appointment of an administrator, to bind the personal estate by any agreement.¹⁴ "This doctrine of relation is a fiction of law to prevent injustice, and the occurrence of injuries where otherwise there would be no remedy; and would not be applied in cases where the rights of innocent parties intervened;"¹⁵ nor "to recognize, validate, and bind the estate by the unauthorized acts which have been done to the prejudice of the estate, by any one, while the title was in abeyance;"¹⁶ nor to give effect to the Statute of Limitation, which does not run during the period intervening between the death of the intestate and the grant of letters.¹⁷ The principle is applicable, *a fortiori*, to executors *in all of the States in which they are required to [*386] give bond before induction into office, or where, for any rea-

¹ Gaskill v. Gaskill, 7 R. I. 478.

² Martin v. Peck, 2 Yerg. 298.

³ Roberts v. Stuart, 80 Tex. 379, 387.

⁴ Trask v. Donoghue, 1 Aik. 370.

⁵ Monroe v. James, 4 Munf. 194.

⁶ Alvord v. Marsh, 12 Allen, 603, 604; McVaughers v. Elder, 2 Brev. 307, 313; Miller v. Reigne, 2 Hill (S. C.), 592, 594; Bullock v. Rogers, 16 Vt. 294, 296; Jones v. Jones, 118 N. C. 440; Missouri P. R. Co. v. Bradley, 51 Neb. 596.

⁷ Lawrence v. Wright, 23 Pick. 128, 129; Gilkey v. Hamilton, 22 Mich. 283, 286. But the title to real estate does not vest in the administrator until there be a decree to that effect: Lane v. Thompson, 43 N. H. 320, 325.

⁸ Wells v. Miller, 45 Ill. 382, 387, citing Collins v. Bankhead, 1 Strobb. 25.

⁹ Brackett v. Hoitt, 20 N. H. 257, 259.

¹⁰ Manwell v. Briggs, 17 Vt. 176, 181; Hatch v. Proctor, 102 Mass. 351, 353.

¹¹ Brown v. Lewis, 9 R. I. 497, 500, citing English cases: Hatch v. Proctor, *supra*; Leber v. Kauffelt, 5 W. & S. 440, 445 (an action on a bond of indemnity to the intestate, where the administrator paid the claim constituting the breach before appointment); and see Rainwater v. Harris, 51 Ark. 401.

¹² Dempsey v. McNally, 73 Md. 433.

¹³ Clark v. Pishon, 31 Me. 503.

¹⁴ Stahl v. Brown, 72 Iowa, 720.

¹⁵ *Per* Napton, J., in Wilson v. Wilson, 54 Mo. 213, 216.

¹⁶ *Per* Cooley, J., in Gilkey v. Hamilton, *supra*; Wiswell v. Wiswell, 35 Minn. 371; Cook v. Cook, 24 S. C. 204.

¹⁷ Benjamin v. DeGroot, 1 Denio, 151; Polk v. Allen, 19 Mo. 467; *post*, §§ 401, 402, under payment of debts.

son, the common-law rule, according to which they derive their authority from the testator, and not from the court, is modified by statute.¹ A conveyance under a power of sale in a will, before probate of such will, by one nominated as executor, will be validated by a subsequent probate of the will.² What executors and administrators may do before probate or grant of letters will be discussed hereafter.³ Mr. Redfield apprehends that by reason of the doctrine of relation, by which the estate vests in the administrator from the death of the intestate, the distinction between executors and administrators as to the time of the vesting of the title has become of no practical importance.⁴

and letters testamentary to the time of testator's death.

§ 174. **Title of Executors and Administrators in auter Droit.** —

The interest which an executor or administrator has in the estate of the deceased is *in auter droit* merely: he is the minister or dispenser of the goods of the dead.⁵ Since the property is not his own, it follows that he may maintain an action therefor *in auter droit*, although he himself be disabled from suing *proprio jure*;⁶ and any one claiming the same under a title from him in his private or personal capacity must show that he has ceased to hold it in a representative capacity.⁷ If the executor or administrator become bankrupt, having property in possession of his testator or intestate distinguishable from his own, it is not liable to the bankrupt's creditors, though it should be money; nor can the property so distinguishable be seized in execution of a judgment against the executor or administrator in his own right.⁸ Although the goods held by an executor pass, as they do at common law, in some of the States, to his executor, yet he cannot in his will dispose of any of the goods so held to

Title of executors and administrators is in the right of others.

Assets are not liable for the debts of executors or administrators,

nor subject to the executor's testamentary disposition,

¹ Schoul. Ex. & Adm. § 194, and authorities: *Ib.* § 238. See *Bambrick v. Webster Groves Association*, 53 Mo. App. 225, 233, *et seq.* Where there is a devise to several in common, to be divided by agreement, a division before the probate of the will vests title to each in severalty, though the subsequent probate is indispensable as evidence of title under the will: *Goodman v. Winter*, 64 Ala. 410, 429; where those nominated as executors are the only ones who are in a position to take possession or control of the personalty, though the will is not probated until after the date when the assessment is made, yet their possession is such by the doctrine of relation as to authorize an assessment against them in their representative capacity: *People v. Barker*, 150 N. Y. 52, 59.

² *Brooks v. McComb*, 38 Fed. R. 317, and authorities. See also *White v. Keller*, 68 Fed. R. (C. C. A.) 796; *Babcock v. Collins*, 60 Minn. 73, and cases cited.

³ *Post*, §§ 185–187.

⁴ 3 Redf. on Wills, 127.

⁵ *Wentw. Ex.* 192; *Weeks v. Gibbs*, 9 Mass. 74, 75; *Lewis v. Lyons*, 13 Ill. 117, 121; *Carter v. National Bank*, 71 Me. 448.

⁶ *Wms. Ex.* [636].

⁷ 3 Redf. on Wills, 130, pl. 2; *Weeks v. Gibbs*, *supra*; *Lessing v. Vertrees*, 32 Mo. 431, 434, overruling former Missouri cases, in which it had been held that the executor or administrator is, for every purpose, the owner of the money of the decedent which had come to his hands.

⁸ *Branch Bank v. Wade*, 13 Ala. 427; *Marvel v. Babbitt*, 143 Mass. 226.

a legatee, for he holds them *in auter droit* only, and cannot bequeath nor to the anything but what he has to his own use.¹ And the marital rights of executrix's similarly, where the common-law rule still exists, by husband. which marriage operates as an unqualified gift

to the husband of all * the wife's goods and personal chat- [* 387] tels, yet it will make no gift to him of the goods and chat-tels which belong to the wife *in auter droit* as executrix or administratrix;² and funds held by an administrator do not pass to his guardian on his becoming *non compos*, and such guardian has no right to intermeddle therewith.³ The possession of personal property acquired as an administrator cannot be united to and perfect an equitable title which he holds in his own right, so as to defeat an action by the party having the legal estate.⁴ But where a chose in action has been assigned, and the assignee become administrator of the assignor's estate after his death, he may recover as administrator to his own use, and without accounting to the estate.⁵ Since an administrator stands in the relation of trustee to all those interested in the estate, property misapplied by him and converted into other property, or sold and the proceeds thus misapplied can, in his hands, be followed, wherever it can be traced through its transmutations, and will be subject, in its new form, to the rights of those interested in the estate; and proof of substantial identity is sufficient.⁶

§ 175. **Power of Alienation.** — But an executor or administrator has at common law power to dispose of and alien the assets of the decedent;⁷ he has absolute power over them for this purpose, and they cannot be followed by the creditors of the deceased.⁸ And he may convert them to his own use,

Common-law right to dispose of the assets.

¹ Wms. Ex. [643], citing Bransby v. Grantham, Plowd. 525, and Godolph., pt. 2, c. 17, s. 3.

² Co. Lit. 351 a; Thompson v. Pinchell, 11 Mod. 177, by Powell, J. Thus, if husband and wife recover judgment for a debt due to the wife as executrix, and the wife dies, the husband shall not have a *seire facias* upon the judgment, but the succeeding executor or administrator: Beamond v. Long, Cro. Car. 208, 227; s. c. W. Jones, 248. But the husband is entitled to administer in his wife's right for his own safety, lest she misapply the funds, in which case he would be liable; and incident to this right he has the power of disposition over the personal estate vested in his wife as executrix or administratrix: Wms. Ex. [644].

³ Ryan v. North Bank, 168 Mass. 215.

⁴ Gamble v. Gamble, 11 Ala. 966.

⁵ Dawes v. Boylston, 9 Mass. 337, 343.

⁶ Pierce v. Holzer, 65 Mich. 263, 272; Holden v. Piper, 5 Colo. App. 71.

⁷ The subject of how the assets of an estate may be transferred is discussed also, *post*, § 331.

⁸ Harper v. Butler, 2 Pet. 239; "The title which is vested in the executor carries with it the *jus disponendi* which generally inheres in the ownership of property": Petersen v. Chemical Bank, 32 N. Y. 21, 45, *per* Denio, C. J.: "A bare act of sale of the assets by the executor is a sufficient indemnity to the purchaser, if there be no collusion": Sutherland v. Brush, 7 John. Ch. 17, 21, *per* Kent, Ch.; Hunter v. Lawrence, 11 Gratt. 111, 133; Field v. Schieffelin, 7 John. Ch. 150, 154; Hertell v. Bogert, 9 Pai. 52, 57; Clark v. Blackington, 110 Mass. 369, 374, *et seq.*; Gray v. Armistead,

thus making himself chargeable for the amount, and subjecting them thus converted to the same incidents and liabilities, in all respects, as if they had never belonged to the estate of the deceased.¹ Thus, under the common-law doctrine of retainer, if the testator or intestate died indebted

Right to appropriate assets under doctrine of retainer.

to the executor or administrator, or where the latter, [*388] *not having ready money of the decedent, or for any other good reason, shall pay a debt of the decedent with his own money, he may elect to take any specific chattel as compensation, and, if it be not more than adequate, it shall by such election become his own. And it has been held that, if the debt due him by the testator amount to the full value of all the effects in the executor's hands, there is a complete transmutation of the property in favor of the executor by the mere act and operation of law.² But we shall see later on, that the doctrine of retainer is abolished, and the rights and duties of executors and administrators with respect to the sale of the assets very considerably modified in most of the American States.³

§ 176. **Other Methods of Conversion.**—There are other methods and ways also in which the property which goes to the executor or administrator *in auter droit* may become his in his own right. Ready money left by the decedent becomes his as soon as it comes into his hands, and he is responsible to the estate for its value; for when it is intermixed with his own money, it cannot be distinguished therefrom so as to enable courts to treat it as the specific property of the estate.⁴ So the executor or administrator may, as well as any other person, buy goods of the decedent sold under a *feri facias*, and when he does so, the property which was vested in him as personal representative becomes his *in jure proprio*.⁵ Where, in the settlement of an estate, the distributees refused to accept a note and mortgage which the administrator had taken for money of the estate loaned, and he paid their distributive shares in cash and other securities, the

Right *in auter droit* converted to right *in proprio*.

6 Ired. Eq. 74, 77; Bradshaw v. Simpson, 6 Ired. Eq. 243, 246; Crooker v. Jewell, 31 Me. 306, 313; Carter v. National Bank, 71 Me. 448; Ladd v. Wiggin, 35 N. H. 421, 430; Overfield v. Bullitt, 1 Mo. 749; Beattie v. Abercrombie, 18 Ala. 9, 18; Hadley v. Kendrick, 10 Lea, 525; Marshall County v. Hanna, 57 Iowa, 372, 375; Rogers v. Zook, 86 Ind. 237, 242.

¹ 3 Redf. on Wills, 130, pl. 1; Schoul. Ex. & Adm. § 239; Mead v. Byington, 10 Vt. 116, 122; Beecher v. Buckingham, 18 Conn. 110, 120; Neale v. Hagthorp, 3 Bland Ch. 551, 563; Lappin v. Mumford, 14 Kans. 9, 15.

² Wms. Ex. [646] *et seq.*, with English authorities. So in the case of a lease of the testator devolved on the executor, such profits only as exceed the yearly value shall be assets; it therefore follows that, if the executor pay the rent out of his own purse, the profits to the same amount shall be his: Wentw. Ex. c. 7, p. 200, 14th ed.; Toller, 239. See, as to doctrine of retainer, *post*, §§ 377 *et seq.*

³ *Post*, §§ 377, 378; see also, as to the sale of the personal property, §§ 329 *et seq.*

⁴ Wms. Ex. [646]; 3 Redf. on Wills, 130, pl. 2 a.

⁵ Wms. Ex. [648].

administrator thereby becomes the absolute owner of such note and mortgage.¹ If the executor or administrator among the goods of the deceased find and take some that were not his, and the owner recover damages for them in trespass or trover, and in all similar cases, the goods become the property of the trespasser, for he has paid for them.² He may make an *under-lease of a [*389] term of years of the deceased, rendering rent to himself, his executors, etc.; and although he has the term wholly in right of the testator or intestate, yet, having power to dispose of the whole, by making a lease of a part, he appropriates that to himself and divides it from the rest, and thus has the rent in his own right; and if he dies, the rent will be payable to his personal representatives and not to the administrator *de bonis non* of the original decedent.³ So an executor who is also a legatee may by assenting to his own legacy vest the thing bequeathed in himself as legatee, and such assent may be express or implied;⁴ and an administrator who is also a distributee may acquire a legal title in his own right to goods of the deceased, by appropriating them to himself as his own share.⁵ So where an executrix used the goods of her testator as her own, and afterwards married, and then treated them as the property of her husband, it was held that she could not be allowed to object to their being taken in execution for her husband's debt.⁶ And after a lapse of six or seven years equity will not restrain by injunction a creditor of an executor from taking in execution property of the testator which is assets in equity.⁷ But Lord Tenterden held that the use of the goods of an intestate by the administrator for three months was not sufficient to raise the presumption that they were the administrator's property.⁸ The possession and retention of a bequest by a legatee for some considerable time, without objection by the executor, will be conclusive that there had been an assent.⁹

§ 177. Property in Auter Droit distinguished from Property in

Difficulty of distinguishing when property is held in *auter droit* and when in *jure proprio* at common law.

Jure Proprio. — Both English and American text-writers call attention to the difficulty of ascertaining when ownership in the character of executor or administrator ceases, and ownership independent of that character commences.¹⁰ Thus it was formerly held, as Williams

¹ Blakely v. Carter, 70 Wis. 540.

² Wms. Ex. [648].

³ Boyd v. Sloan, 2 Bailey, 311, 312;

3 Redf. on Wills, 131, pl. 2 a.

⁴ Chester v. Greer, 5 Humph. 26; but such assent will not be presumed in the absence of acts and declarations conducing to show an assent: Murphree v. Singleton, 37 Ala. 412, 416. *Post*, § 453, on executor's assent.

⁵ Parke, B., in Elliott v. Kemp, 7 M. & W. 306, 313.

⁶ Quick v. Staines, 1 Bos. & Pull. 293.

⁷ Ray v. Ray, Coop. Ch. Cas. 264.

⁸ Gaskell v. Marshall, 1 Mood. & Rob. 132, in which the judge, upon Quick v. Staines, *supra*, being cited, observed that the marriage in that case made all the difference.

⁹ Hall v. Hall, 27 Miss. 458, 460; see *post*, § 453, on executor's assent.

¹⁰ Wms. Ex. [643]; 3 Redf. on Wills,

points out,¹ that in respect to land no merger can take place [* 390] of * the estate held by a man as executor in that which he holds in his own right;² but a distinguished author³ urges this distinction, viz. that when either of the two estates is an accession to the other by *act of law*, there will not be any merger, but that where the accession is *by act of the party*, the lesser estate will merge. Although opposed to the views of earlier lawyers,⁴ this distinction seems to be supported by the current of authorities.⁵ It is also to be observed that a person originally entitled to a term or to an estate of freehold as executor or administrator may in process of time become the owner in his own right. Thus, an executor who is also residuary legatee, having performed the purposes of the will, holds the estate as legatee; so where he pays money of his own to the value of the term in discharge of the testator's debts, and with an intention of appropriating the term to his own use in lieu of the money, he holds in his own right; and so does an administrator who is entitled to the whole beneficial ownership of the intestate's property, or procures a discharge from those who are to share that property with him, and all the debts of the intestate are paid. Under these and the like circumstances the executor or administrator will have the estate in his own right, and when he has the estate in his own right it will be subject to merger.⁶ In America, however, the difficulties attending the ascertainment of the character in which property is held by executors and administrators, whether *qua* executor (or administrator) or in some other capacity (such as guardian, trustee, legatee, etc.) are greatly diminished by statutory provisions requiring the distribution of assets to be made under order of the probate court, or at least to be reported in the annual or final settlements made in court.⁷ And since the ownership is in the first place always that of executor or administrator, it is incumbent upon any one who would attach a right to the assets derived from or through the executor or administrator personally, to show that the original title has been changed, and that he holds the property in some other capacity, which may be done by proving a sale, conversion, or merger in any of the methods by which a personal representative may divest the title of his testator or intestate. Hence, since an order of distribution, or to pay debts or legacies, operates to change the representative's official to a fixed personal liability,⁸ it follows

This difficulty
slighter in
America.

¹ Wms. Ex. [640] *et seq.*

² 2 Bla. Comm. 177; Jones *v.* Davies, 5 H. & N. 766.

³ Preston on Conveyancing, vol. iii. p. 273 *et seq.* (3d ed., 1829).

⁴ Lord Holt, in Gage *v.* Acton, 1 Salk. 325, 326, and Lord Kenyon, in Webb *v.* Russell, 3 T. R. 393, 401. "Nothing is VOL. I. — 27

clearer," says the latter, "than that a term which is taken *alieno jure* is not merged in a reversion acquired *suo jure*."

⁵ Wms. Ex. [641].

⁶ Wms. Ex. [642]; 3 Preston on Conv. 310, 311.

⁷ See *infra*, p. * 391.

⁸ As will appear in discussing the sub- 417

Administrator
may be garn-
ished after
order to pay,

but not while
holding in offi-
cial capacity,
unless allowed
by statute.

that he may thereafter, and before payment, be summoned as garnishee by an attaching or execution creditor of the beneficiary to whom the executor or administrator is ordered to pay.¹ Conversely, it is generally held that while holding in his representative character, he is not subject to garnishment process,² unless he is made so by express statutory provision, as is the case in a large and increasing number of the States.³

* An executor or administrator having assets, being also [* 391] the guardian of a legatee or distributee, may transfer the

Transfer of
property held
in one capacity
to himself
in another
capacity.

distributive share to himself as guardian; but to do so, and thus fix his liability in the new capacity, some distinct act or declaration is necessary.⁴ Nor can there be a transfer of a mere naked liability, as, for instance, the debt owing to the estate by an insolvent fiduciary.⁵

So, if a trustee must give bond, an executor who is also made

ject of distribution under the American statutes: *post*, § 569, and of the order to pay debts: *post*, § 411.

¹ *Richards v. Griggs*, 16 Mo. 416; *Harrington v. La Rocque*, 13 Ore. 344; *Fitchett v. Dolbee*, 3 Harring. 267; *Bartell v. Banmann*, 12 Ill. App. 450; *Hoyt v. Christie*, 51 Vt. 48.

² *Curling v. Hyde*, 10 Mo. 374; *Gill v. Middleton*, 60 Ark. 213; *Norton v. Clark*, 18 Nev. 247; *Post v. Love*, 19 Fla. 634; *McCreary v. Topper*, 10 Pa. St. 419. And it is held to avail the creditor nothing if garnishment proceedings are instituted before an order of distribution, that the proceedings remain in court until thereafter: *Case v. Miracle*, 54 Wis. 295. The amount due the beneficiary must be fixed before there can be judgment against a garnishee: *Roth v. Hotard*, 32 La. An. 280. The administrator of a garnishee who dies before answering cannot be brought in by revivor: *White v. Ledyard*, 48 Mich. 264; *Tate v. Morehead*, 65 N. C. 681; *Brecht v. Colby*, 7 Mo. App. 300, 307; unless the statute permits him to be garnished: *Holman v. Fisher*, 49 Miss. 472.

³ So in Iowa: *Boyer v. Hawkins*, 86 Iowa, 40 (in which the court says "that in most of the States the tendency has been to broaden the scope of this remedy"); *Shepherd v. Bridenstein*, 80 Iowa, 225 (holding that the statute did not authorize the administrator to be garnished

officially on a suit against him personally); Alabama: (where the personal creditor of an executor may garnish the latter in his official capacity for a debt due him individually): *Dudley v. Falkner*, 49 Ala. 148; New Hampshire: *Palmer v. Noyes*, 45 N. H. 174; but the administrator cannot garnish himself: *Hoag v. Hoag*, 55 N. H. 172; Maryland: *Hardesty v. Campbell*, 29 Maryland, 533; Massachusetts: *Mechanics' Bank v. Waite*, 150 Mass. 234; Pennsylvania (on foreign attachment): *Simickson v. Painter*, 32 Pa. St. 384; Mississippi: *Holman v. Fisher*, 49 Miss. 472; Georgia: *Sapp v. McArdle*, 41 Ga. 628; but see *Davis v. Davis*, 96 Ga. 136; Maine: *Cummings v. Garvin*, 65 Me. 301; Indiana: *Simonds v. Harris*, 92 Ind. 505; Connecticut: *Johnes v. Jackson*, 67 Conn. 81 (permitting garnishment before probate); *Barnum v. Boughton*, 55 Conn. 117 (but refusing to allow the widow's allowance to be attached in the administrator's hands); Virginia (the heir being non-resident): *Vance v. McLaughlin*, 8 Gratt. 289; and probably other States.

⁴ *Sanborn's Estate*, 109 Mich. 191; *Smith v. Gregory*, 26 Gratt. 248, 257; *Miller v. Congdon*, 14 Gray, 114. See also authorities cited *post*, § 569, p. * 1252. See also *Woerner on Guardianship*, § 102, p. 344.

⁵ This subject is more fully discussed in connection with the liability of sureties, *post*, § 255, p. * 551.

trustee will remain liable as executor until he has given bond as trustee;¹ or if no bond be required, until by some authoritative and notorious act he elects, or is directed, to act in the capacity of trustee;² and if a legacy is given to one *qua* executor, he remains liable as executor, although he take credit therefor as legatee.³ So a special administrator is liable for money belonging to the estate received by him as agent of a previous administrator.⁴ And an administrator who is also guardian, or trustee, who has completed the administration and therefore has no further use for assets, is presumed to hold the property as guardian,⁵ or trustee,⁶ as the case may be. And, in general, where a man holds money in several capacities, the law will attach to him liability in that capacity in which of right it ought to be held;⁷ as where a man in his own person unites, by operation of law, the character of debtor and creditor.⁸ See on this point the subject of debts by the executor or administrator to the deceased.⁹ It may also be observed that where one is acting in a dual capacity the law will resolve doubts by attributing his acts with respect to the subject-matter to the proper capacity.¹⁰

An administrator cannot contract with himself. Hence, being indebted to the estate for misappropriation of assets, where he makes a note payable to himself as administrator, and executes a mortgage to himself to secure the same, such mortgage, as a mortgage, is inoperative.¹¹ The cancellation and release by an administrator of his own mortgage to the

Administrator
cannot contract
with himself.

¹ *Prior v. Talbot*, 10 Cush. 1; *Dorr v. Wainwright*, 13 Pick. 328, 331; *Probate Court v. Hazard*, 13 R. I. 1, 2; *Hall v. Cushing*, 9 Pick. 395, 409.

² *Shaw, Ch. J.*, in *Newcomb v. Williams*, 9 Metc. 524, 534. In some States the order of the probate court is necessary: see *Higgins' Estate*, 15 Mont. 474, 488-500, with numerous quotations of decisions from other States in the opinion. So in *Scheffer's Estate*, 58 Minn. 29, the court say: "In the case of one who is executor and also a legatee in trust, or otherwise, to ascertain whether his possession as executor has ceased, and his possession as legatee begun, we must look to the action of the probate court upon the matter," and holding that to change the capacity in which he holds, the order of the court must show that its attention was directed to it.

³ *Probate Court v. Angell*, 14 R. I. 495, 499.

⁴ *Gottsberger v. Taylor*, 19 N. Y. 150.

⁵ *United States v. May*, 4 Mackey, 4, 7; *Tittman v. Green*, 108 Mo. 22, and cases cited, p. 39; see also *post*, § 569, p. *1252, as to the effect of an order of distribution to change a holding by one in one capacity to himself in another.

⁶ *Abell v. Brady*, 79 Md. 94, 96, and cases cited.

⁷ *Kirby v. State*, 51 Md. 383, 392, citing many Maryland cases; *State v. Cheston*, 51 Md. 352, 376; *Citizens' Bank v. Sharp*, 53 Md. 521, 527.

⁸ *Schnell v. Schroder*, Bail. Eq. 334; *Enicks v. Powell*, 2 Strobh. Eq. 196, 206; *Griffin v. Bonham*, 9 Rich. Eq. 71, 77; *Jacobs v. Woodside*, 6 S. C. 490; *Todd v. Davenport*, 22 S. C. 147; *Smith v. Gregory*, 26 Gratt. 248, 260.

⁹ *Post*, § 311.

¹⁰ Even when purporting to be done in the other capacity: *Duckworth v. Co.*, 98 Ga. 193.

¹¹ *Gorham v. Meacham*, 63 Vt. 231.

estate, not upon payment to the estate, but for the purpose of executing a new mortgage with the knowledge of the new mortgagee, is invalid.¹ That an administrator in his individual capacity cannot sue himself in his representative character is stated elsewhere.²

¹ *Eastham v. Landon*, 17 Wash. 48.

² *Post*, § 377.

[* 392]

* CHAPTER XIX.

OF SPECIAL AND QUALIFIED ADMINISTRATORS.

§ 178. **Administrators cum Testamento annexo.**—It has been shown that the chief distinction between an executor and an administrator lies in the source of their appointment, and in the fact that the one disposes of the estate according to the directions of the testator, while the other is governed in this respect by the general law.¹ The distinction is still fainter in cases where a will exists and, from any cause, there is no executor. In such case the probate court designates a person to carry out, or *execute*, the will, which is then annexed to and becomes part of his letters; from which circumstance he is known as administrator (not executor, because not nominated by the testator) *cum testamento annexo*, or administrator with the will annexed. Since it is his duty to dispose of the property of the testator in accordance with the provisions of the will, it is obvious that his powers can differ but slightly from those of an executor. Indeed, the difference sometimes insisted upon—that an administrator *cum testamento annexo* cannot execute such powers conferred by the testator upon the executor as may be beyond the ordinary functions of an executor—is not in reality a difference between the administrator and executor at all, because powers beyond the ordinary functions of executors are to that extent a testamentary trust, and vest in him as such trustee, not because he is executor, but in addition to and independent of his office as such.²

Distinction between executor and administrator *cum testamento annexo*.

Since all the duties of an executor, pertaining to his office as such, devolve to the administrator with the will annexed,³ [* 393] the *latter possesses, generally, the same powers, is bound by the same duties, and subject to the same liabilities as the former,⁴ whether ap-

Powers, duties, and liabilities of administrator *c. t. a. gen-*

¹ *Ante*, § 171.

² *Shaw v. McCameron*, 11 S. & R. 252, 255.

³ *Blake v. Dexter*, 12 Cush. 559, 569; *Buttrick v. King*, 7 Met. (Mass.) 20; *Wilson's Estate*, 2 Pa. St. 325, 329; *Hester v. Hester*, 2 Ired. Eq. 330, 339; *Jackson v. Jeffries*, 1 A. K. Marsh. 88; *King v.*

Talbert, 36 Miss. 367, 373; *Olwine's Appeal*, 4 W. & S. 492; *Lucas v. Price*, 4 Ala. 679, 683.

⁴ *Kidwell v. Brummagim*, 32 Cal. 436, 439, citing *Jackson v. Ferris*, 15 John. 346, 347; *Bowers v. Emerson*, 14 Barb. 652; *Farwell v. Jacobs*, 4 Mass. 634, 636. It was held that the office of administrator

erally the same as of an executor. pointed originally, or upon the death, removal, or resignation of the executor;¹ but the powers and duties not necessarily connected with the functions of an executor devolve upon the administrator with the will annexed only when it appears clearly from the will that the testator so intended;² as where, for instance, he directed an act to be done at all events, without leaving any discretion to the executor.³

The power of the administrator with the will annexed is not, generally, limited to the administration of the estate disposed of by the will, although it has in some cases been held so,⁴ but extends to the whole of the decedent's estate,⁵ unless the testator has otherwise directed.⁶

The power to sell lands granted to executors who refuse to qualify, or are removed or die, is in most States regulated by statute, and will be further considered in connection with the subject of the management of real estate.⁷

§ 179. **Administrators de Bonis non.**— Upon the death, removal, or resignation of a sole executor or administrator, or of all of several joint executors or administrators, before the estate has been fully administered, it becomes necessary to appoint a successor, to the end that the administration may be completed.⁸ Such an officer is known

Administrator *de bonis non* administers the assets remaining unadministered.

* as administrator *de bonis non (administratis)*, [* 394]

— administrator of the unadministered effects; or, if he succeed an executor or an administrator *cum testamento annexo*, he is known as administrator *de bonis non cum testamento annexo*, — administrator with the will annexed of the unadministered goods. At common law there is a distinction in this respect between executors and administrators, growing out of the doctrine that an executor's executor succeeds to the estate of the deceased executor's testator,

Distinction in this respect at common-law between executors and administrators.

with the will annexed ceases upon the setting aside of the will in the same way as if he were executor under the will: *Kitton v. Anderson*, 18 R. I. 136.

¹ *Ex parte Brown*, 2 Bradf. 22.

² *Ingle v. Jones*, 9 Wall. 486, 498; *Knight v. Loomis*, 30 Me. 204; *Conklin v. Egerton*, 21 Wend. 430; *Tainter v. Clark*, 13 Met. 220, 226; *Wills v. Cowper*, 2 Oh. 312, 316; *Moody v. Vandyke*, 4 Bin. 31; *Dunning v. Ocean Bank*, 61 N. Y. 497, 501.

³ *King v. Talbert*, 36 Miss. 367, 373.

⁴ *Harper v. Smith*, 9 Ga. 461; *Ashburn v. Ashburn*, 16 Ga. 213, 216; *Dean v. Biggers*, 27 Ga. 73, 75. These Georgia cases hold that, where it becomes necessary, the administrator *cum testamento*

annexo should also take a grant of administration *et ceterorum*.

⁵ *Ex parte Brown*, 2 Bradf. 22; *Landers v. Stone*, 45 Ind. 404.

⁶ 3 Redf. on Wills, 96, pl. 2, citing *Hays v. Jackson*, 6 Mass. 149, in which *Parsons, C. J.*, says that the correct practice in America is that executors administer undivided estate *ex officio*, without a letter of administration. The same doctrine is held in *Landers v. Stone*, 45 Ind. 404, 407; *Venable v. Mitchell*, 29 Ga. 566. See on this point *post*, § 229.

⁷ *Post*, §§ 339 *et seq.*

⁸ *Scott v. Fox*, 14 Md. 388, 394. See *post*, § 351, on the succession of administrators.

but not the deceased executor's administrator, nor does a deceased administrator's executor or administrator succeed to the estate of the original intestate.¹ This distinction disappears, of course, with the rule from which it springs, and now exists in very few of the American States;² where it is not recognized, the necessity for the appointment of an administrator *de bonis non* is the same, whether it was an executor or administrator who left the estate unadministered.³ It is to be observed, however, that a successor to an executor provided for in the will by the testator, completes the administration as executor, not as administrator.⁴

An estate is not fully administered so long as anything remains to be done to vest the title of the decedent's estate in the beneficiary, whether creditor, next of kin, legatee, or devisee, which no one but an executor or administrator can lawfully do; such as paying a legacy, or distributing the effects or assets,⁵ although the assets had been reduced to money,⁶ paying debts,⁷ collecting debts,⁸ or the like. But it has been held that an administrator *de bonis non* cannot be appointed for the sole purpose of making a conveyance which the original administrator ought to have made, and that such appointment is not necessary in some other instances where it would serve no useful purpose.⁹

The administration *de bonis non* may be granted after any length of time,¹⁰ but lapse of time and other circumstances may * raise a presumption that all debts against an estate are barred or paid, and that the remaining assets belong to the heirs, in which case the

Unadministered estate.

Time within which an administrator *d. b. n.* may be appointed.

¹ See, as to the authority of a deceased executor's executor to the estate of the original testator, *post*, § 350.

² *Post*, § 350.

³ *Taylor v. Brooks*, 4 Dev. & B. L. 139, 143; *Carroll v. Connet*, 2 J. J. Marsh. 195, 205.

⁴ *Kinney v. Keplinger*, 172 Ill. 449.

⁵ *Alexander v. Stewart*, 8 G. & J. 226, 244; *Hendricks v. Snodgrass*, Walk. (Miss.) 86; *Scott v. Crews*, 72 Mo. 261, 264; *University v. Hughes*, 90 N. C. 537; *Kinney v. Keplinger*, 172 Ill. 449.

⁶ *Donaldson v. Raborg*, 26 Md. 312, 326; *De Valengin v. Duffy*, 14 Pet. 282, 291.

⁷ *Howell v. Jump*, 140 Mo. 441. Although the estate was all distributed: *Brattle v. Converse*, 1 Root, 174; *Brattle v. Gustin*, 1 Root, 425; *Bancroft v. Andrews*, 6 Cush. 493, 494; *State v. Farmer*, 54 Mo. 439, 445.

⁸ Although such debts were on final settlement accounted for as uncollectible,

but afterwards became good: *Mallory's Appeal*, 62 Conn. 218. But in Iowa it is held that if the debts of the estate are all paid and the administrator discharged the court has no jurisdiction to re-appoint the administrator to collect a debt which on final settlement it was presumed would be paid; in such case the heirs should sue as property due to them: *Jordan v. Hunnel*, 96 Iowa, 334. A claim instituted by a removed executor should be prosecuted by his successor: *Hayward v. Place*, 4 Dem. 487.

⁹ See *post*, § 352, p. * 749, cases referred to in note; *Grayson v. Weddle*, 63 Mo. 523, 539; *Long v. Joplin M. Co.*, 68 Mo. 422, 427.

¹⁰ *Bancroft v. Andrews*, 6 Cush. 493, 495; citing *Kempton v. Swift*, 2 Metc. (Mass.) 70, in which the second administration was granted more than thirty years after the first; *Holmes, Petitioner*, 33 Me. 577.

administration cannot be reopened by the appointment of an administrator *de bonis non*.¹ If nothing remains to be done to complete administration, the grant of letters *de bonis non* is merely nugatory.²

Since there can be but one valid administration in the same State of the same succession at the same time, the appointment of an administrator *de bonis non* before the death, removal, or resignation of the executor or original administrator is obviously a nullity;³ and this applies with the same force to the case of several joint executors or administrators, so long as one of them remains in office, because the grant of administration is an entirety, and the authority survives to the last one.⁴ But the mere informality of omitting the words *de bonis non* in the appointment of an administrator to succeed a general administrator who had died,⁵ or of omitting to enter the order removing the administrator, when the facts necessary to sustain such order are recited in connection with the grant of administration *de bonis non*, does not render such appointment void.⁶ And it was held in Minnesota that although the statute does not contemplate the appointment of an administrator where there is already one whose office has not been extinguished, yet the appointment in such case, though erroneous, is not void.⁷ See on this subject the chapter on the privity between executors and administrators of the same estate.⁸

Vacancy in the administration before administrator *d. b. n.* can be appointed.

When public administrator may take charge of estates.

§ 180. **Public Administrators.**—The public administrator, or administrator general, is an officer authorized by the statutes of several of the States to administer the estates of persons dying intestate without

¹ Murphy v. Menard, 14 Tex. 62, 67.

² Wilcoxon v. Reese, 63 Md. 542, 545.

³ Munroe v. People, 102 Ill. 406, 409; Rambo v. Wyatt, 32 Ala. 363, 365; Matthews v. Douthitt, 27 Ala. 273; Watkins v. Adams, 32 Miss. 333, 335; Petigru v. Ferguson, 6 Rich. Eq. 378; Grande v. Chaves, 15 Tex. 550; Hamilton's Estate, 34 Cal. 464; Bowman's Estate, 121 N. C. 373; Creath v. Brent, 3 Dana, 129. And in Indiana can only be granted in case of vacancy before final settlement: Croxton v. Renner, 103 Ind. 223.

⁴ Lewis v. Brooks, 6 Yerg. 167; State v. Green, 65 Mo. 528, 530, citing State v. Rucker, 59 Mo. 24. See *post*, § 346. And for further discussion and citation of authorities on this and similar points, § 245.

⁵ Moselin v. Martin, 37 Ala. 216, 219; Steen v. Bennett, 24 Vt. 303; Bailey v.

Scott, 13 Wis. 618; *per* Fuller, C. J., in Veach v. Rice, 131 U. S. 293, 315.

⁶ Ragland v. King, 37 Ala. 80; Russell v. Erwin, 41 Ala. 292. The appointment of an administrator *de bonis non* is of itself *prima facie* evidence of a vacancy; and this presumption must prevail in a collateral proceeding until clearly disproved: Macey v. Stark, 116 Mo. 481, 501. On this and similar points see *post*, § 245 p. *534, note.

⁷ Culver v. Hardenbergh, 37 Minn. 225, 232, 236. On the ground that where a probate court appoints a first administrator, it thereby acquires jurisdiction to direct and control the administration, and that such jurisdiction continues until its close, and sustains all that the court may do in the course and for the purpose of the administration.

⁸ *Post*, §§ 351 *et seq.*

relatives entitled to administer,¹ or where those entitled refuse to do so. In some of the States this officer is elected by the people, and holds office for a number of years;² in others he is appointed [* 396] * by the governor,³ or by the court having probate jurisdiction,⁴ and in North Carolina by the clerk of the Supreme Court. It is held in the last-named State that the office of public administrator is a property right of which the incumbent cannot be deprived on the ground of his failure to renew his bond without due notice to him to show cause why his authority should not be revoked.⁵ In Alabama such officer is appointed for the county of Mobile only;⁶ but the probate court may compel the sheriff or coroner to administer, and on application of a creditor the probate judge refusing to make such an order may himself be compelled by *mandamus* to do so.⁷ So, in Arkansas⁸ and Virginia,⁹ sheriffs are *ex officio* public administrators, and the authority of probate courts to order the sheriff to take charge of an estate without reciting the reason therefor is unquestioned.¹⁰ In Georgia the ordinary may compel the clerk of the Superior Court to perform the duties of administrator, if no one else can be found to apply for letters.¹¹ When administration is committed to any such officer, he is liable on his official bond for its faithful performance;¹² in Arkansas it is held that the sureties on the sheriff's bond are liable, although a special administration bond was given in each estate taken charge of as public administrator;¹³ but it is ruled differently in other States.¹⁴ In Georgia the ordinary may order an estate to be administered by the clerk without bond, if no one can be found who will give bond.¹⁵ The authority of these officers as administrators does not usually

¹ Abb. L. Dict. "Administer."

² In California, Missouri, Montana, Nevada, and New York.

³ Colorado, Illinois, Maine, and Massachusetts.

⁴ Kentucky, Mississippi, Tennessee, and Wisconsin.

⁵ Trotter v. Mitchell, 115 N. C. 190. And where, upon notice served for failure to renew his bond, the bond is tendered, no other default having been shown, it was held error for the clerk to refuse to accept the bond so tendered: Trotter v. Mitchell, 115 N. C. 193.

⁶ It is there held that an order by the probate court committing an estate to the charge of the general administrator is not void for the omission to recite the due appointment of the general administrator: Russell v. Erwin, 41 Ala. 292.

⁷ Brennan v. Harris, 20 Ala. 185. The grant of letters of administration to the

sheriff or coroner *virtute officii* expires with his term: Landford v. Dunklin, 71 Ala. 594, 609.

⁸ Dig. St. 1894, §§ 238-245.

⁹ Hutcheson v. Priddy, 12 Gratt. 85, 87.

¹⁰ State v. Watts, 23 Ark. 304, 312. But the sheriff has no authority to allow or reject claims against the estate of a decedent until he has assumed the charge of the assets, or been ordered to assume the administration by the probate court: Williamson v. Furbush, 31 Ark. 539, 541.

¹¹ Johnson v. Tatum, 20 Ga. 775.

¹² Scarce v. Page, 12 B. Mon. 311; Cocke v. Finley, 29 Miss. 127.

¹³ The court so concluded "with much hesitation": State v. Watts, 23 Ark. 304, 309.

¹⁴ McNeil v. Smith, 55 Ga. 313.

¹⁵ Code, 1895, § 3391.

cease with their official term, but continues until the estate is fully administered;¹ but in South Carolina the authority of a commissioner in equity suing out letters of administration on a derelict estate is held to cease with his office as commissioner, and his successor must sue out letters *de bonis non*;² and in Missouri, while he may continue to administer estates in his hands after his term of office has expired, yet his functions cease when he has resigned as such, and a successor has been appointed.³

In most States the authority of the public administrator, or * administrator general, depends upon appointment by,⁴ or [* 397] letters obtained from, the probate court,⁵ upon the application of some party interested,⁶ or without such application; and a public administrator, by making application, acquires no vested right as against his successor in office⁷ and in some States it is made his duty to take into custody and protect against loss and waste any estate not otherwise administered, until there may be a regular appointment of some person having preference under the law.⁸ In Missouri⁹ and New York,¹⁰ however, the public administrator takes charge of estates under circumstances pointed out by the statute, without order of the probate court or surrogate; but he may be ordered to take charge of other estates in their discretion.

In Missouri the public administrator is required to file notice in the probate court whenever he takes charge of an estate; but the validity of his administration does not depend upon giving such notice,¹¹ nor can his authority be questioned collaterally.¹² The probate court may direct him to take charge of an estate for any

¹ Beale v. Hall, 22 Ga. 431; Russell v. Erwin, 41 Ala. 292; Rogers v. Hoberlein, 11 Cal. 120; Warren v. Carter, 92 Mo. 288; Thornton v. Loague, 95 Tenn. 93; Tunstall v. Withers, 86 Va. 892. When his authority depends upon a grant of letters from the court, as in most States, it is not enough that his petition for letters be filed before the expiration of his term, but it is necessary that letters also be granted before that time: *In re* Pingree, 100 Cal. 78; his status at the time of granting letters determines his competency; *In re* McLaughlin, 103 Cal. 429.

² Levi v. Huggins, 14 Rich. 166.

³ State v. Kennedy, 73 Mo. App. 384. In such case the court should order him to settle and turn over the estate to his successor: *Ib.*

⁴ Morse v. Griffith, 25 La. An. 213; Wilson v. Dibble, 16 Fla. 782, 784, citing Davis v. Shuler, 14 Fla. 438.

⁵ Thomas v. Adams, 10 Ill. 319; Estate of Hamilton, 34 Cal. 464. A direc-

tion to the sheriff to take charge of the estate of "Robert W." does not authorize him to take charge of the estate of "Henry W.": *Woodyard v. Threlkeld*, 1 A. K. Marsh. 10.

⁶ Unknown Heirs v. Baker, 23 Ill. 484; Succession of Miller, 27 La. An. 574.

⁷ State v. Woody, 20 Mont. 413, 417.

⁸ Beckett v. Selover, 7 Cal. 215.

⁹ Rev. St. 1889, § 299.

¹⁰ 3 Banks & Bro., pp. 2309, 2319.

¹¹ Adams v. Larrimore, 51 Mo. 130, 131.

¹² Dunn v. Bank, 109 Mo. 90, 101; Green v. Tittman, 124 Mo. 372; Wetzel v. Waters, 18 Mo. 396. But proof of the filing of the notice by a person not shown to be public administrator is not sufficient to show that such person is legally in charge of the administration; and the certificate of the probate judge that he is public administrator is not competent proof; it must be shown by a copy of the record of appointment as public administrator: *Littleton v. Christy*, 11 Mo. 390, 393.

good cause, "to prevent its being injured, wasted, purloined, or lost;"¹ the partnership estate of a deceased partner forms no exception.² But it is held that he has no authority to bring suit against a foreign insurance company, doing business in Missouri, upon a policy of insurance not made, nor to be executed, in Missouri, upon the life of a citizen of another State, who neither resided, died, nor left property in Missouri;³ nor to maintain an action for assets of an estate which he has unlawfully taken charge of.⁴

His action in taking charge of an estate without the [* 398] * order of the probate court is not final, but may be annulled by the probate court, if in its opinion the facts did not warrant the administration by the public administrator.⁵ Under the statute of 1845 he might resign as public administrator and be appointed as an individual administrator *de bonis non*.⁶ A Michigan case intimates that the validity of the acts of a public administrator having an estate in charge without appointment by the probate court, is collaterally assailable.⁷

In New York there is a distinction between the powers of the public administrators in the city of New York, and of those of the interior counties. In New York City the public administrator is made the head of a bureau in the law department, and is to be appointed by the corporation counsel.⁸ He takes charge "in right of his office" of the estates of persons dying intestate within the State or elsewhere leaving property in the city or county of New

¹ This statute authorizes the public administrator to take charge of any estate under order of the probate court upon which no administration has previously been granted: *Callahan v. Griswold*, 9 Mo. 784. And he cannot refuse to take charge of and administer any estate which by law should be administered so long as he holds office: *State v. Kennedy*, 73 Mo. App. 384, 388.

² *Headlee v. Cloud*, 51 Mo. 301.

³ *Insurance Company v. Lewis*, 97 U. S. 682.

⁴ *Lewis v. McCabe*, 76 Mo. 307. The principle announced in this case was repudiated by two of the judges, who in their dissenting opinion call attention to the case of *Wetzell v. Waters*, 18 Mo. 396 (cited *ubi supra*), with the doctrine of which it conflicts. It seems to militate against the case of *Headlee v. Cloud* also, in which it is announced that the public administrator cannot be divested of an administration in a collateral proceeding, but only on application to the probate court: 51 Mo. 302. And again, in a recent case,

after calling attention to the latter two cases, the court observe: "Even if the facts did not exist to justify him in taking charge of the estate, he would be the administrator until superseded by a duly appointed private administrator." *Leeper v. Taylor*, 111 Mo. 312, 322. In view of these considerations, it may well be doubted whether *Lewis v. McCabe*, *supra*, will be adhered to in subsequent cases.

⁵ *McCabe v. Lewis*, 76 Mo. 296, 301, reversing Court of Appeals. Two of the judges dissent from this principle, holding with the Court of Appeals, that the probate court had no power to control the public administrator's discretion in taking charge of estates.

⁶ *Macey v. Stark*, 116 Mo. 481, 497.

⁷ *Per Cooley, C. J.*, in *Reynolds v. McMullen*, 55 Mich. 568, 573. The authority relied on (*Illinois Railroad Co. v. Cragin*, 71 Ill. 177) holds letters granted by a clerk, and not approved by the court, to be impeachable collaterally.

⁸ *Laws*, 1873, ch. 335, § 38.

York, or when such property shall arrive there after the death of such person, or leaving effects at the quarantine of said city.¹ Outside of the city of New York, the several county treasurers are bound, *virtute officii*, to accept appointment as administrators made by the surrogates, to give bond, etc.² The effects of foreigners dying intestate are taken charge of by the commissioners of emigration of the city of New York until such time as their authority may be superseded by letters regularly granted; these commissioners may also appropriate to the use of any minor child its distributive share of the estate in their charge.³

The circumstances under which a public administrator is authorized to take charge of an estate depend, of course, wholly upon the respective statutes. It has already been mentioned, that in some of the States it is his duty to take charge of estates, in certain contingencies, without order or letters from the probate court;⁴ and also, that where he has such authority, but does not * exercise it, he may be compelled to do so by order of the [* 399] probate court.⁵ So also, although the public administrator assume the charge of an estate without order or authority from the probate court, exercising in this respect a co-ordinate jurisdiction, yet the validity of his act in so doing may be questioned in the probate court, and his authority annulled if found unwarranted by the circumstances.⁶ And similarly the authority of the public administrator may be revoked, even where he was appointed by decree of the probate court, if such decree was improvidently granted.⁷

The exercise of the discretion of probate courts, under the statutes on this subject, in granting letters of administration to public administrators, or ordering them to take charge of the estates of deceased persons, is not always without difficulty. It has been held that the right of the public administrator to letters is confined to cases of intestacy; in estates of testates the court may exercise its discretion.⁸ Where, the next of kin being disqualified, the grant of letters to the public administrator, or to another person, is discretionary, neither the expressed desire of the intestate, nor the unanimous recommendation of the next of kin have any legal effect to narrow such discretion;⁹ but if there is a contest between a creditor and

When probate court may direct the public administrator to take charge of an estate.

¹ 3 Banks & Bro., p. 2309.

² *Ib.*, p. 2319 *et seq.*

³ *Ex parte* Commissioners of Emigration, 1 Bradf. 259.

⁴ *Supra*, p. * 397.

⁵ *Supra*, p. * 397.

⁶ *Donaldson v. Lewis*, 7 Mo. App. 403, 405; and the judgment of the probate court in such case may be appealed from:

Ib. p. * 406. See also cases cited *supra*, p. * 397 and p. * 398.

⁷ *Varnell v. Loague*, 9 Lea, 158, 161; *Proctor v. Wanmaker*, 1 Barb. Ch. 302, 308, citing English cases.

⁸ *Nunan's Estate*, Myr. 238.

⁹ *Estate of Morgan*, 53 Cal. 243; *Estate of Kelly*, 57 Cal. 81.

the public administrator, other creditors will be heard, and the public administrator may be appointed at their request.¹ He cannot, however, be appointed provisionally until the contest for the administration is determined, if he is himself one of the applicants;² and where, pending the application of a public administrator, his term of office expires, he is not entitled to the appointment.³ It was held, at one time, that the claim of the public administrator was superior to that of blood relatives who are not entitled to distribution;⁴ but this decision was overruled in later cases,⁵ and it is now held that the claim of one next of kin, although not entitled to distribution, is superior to that of the public administrator.⁶ And where, in case of disqualification of the next of kin, the public administrator is entitled, the application [* 400] * of one nearer of kin than any person residing in the

United States will not prevail against the public administrator's right.⁷ So the public administrator has preference over the guardian to one next of kin;⁸ and, at the surrogate's discretion,⁹ over a trust company authorized by statute to administer;¹⁰ and in California is preferred to one who is creditor of the intestate and the nominee of a non-resident heir;¹¹ but the probate court may in its discretion appoint the guardian of an incompetent person, or minor, in preference to the public administrator.¹² In Illinois the creditor of a non-resident intestate is preferred to the public administrator.¹³ In Montana it was held that where occasion arises under the statute of that State to appoint a special administrator, the public administrator cannot be appointed if there are next of kin competent and willing to act.¹⁴ In Louisiana the public administrator as such is not entitled to administer as dative testamentary executor where the testamentary executor has died, and there are heirs present in the State;¹⁵ nor to a grant of letters where there are

¹ Doak's Estate, 46 Cal. 573.

² Succession of Miller, 27 La. An. 574.

³ State v. Woody, 20 Mont. 413, 419.

⁴ Public Administrator v. Peters, 1 Bradf. 100.

⁵ Lathrop v. Smith, 35 Barb. 64; 24 N. Y. 417, 420.

⁶ Butler v. Perrott, 1 Dem. 9.

⁷ Public Administrator v. Watts, 1 Pai. 347, 382; Matter of Blank, 2 Redf. 443, 445; Murphy's Estate, Myr. 185.

⁸ Speckles v. Public Administrator, 1 Dem. 475 (under a special act of New York); and over an illegitimate claimant whose right to distribution is not clearly proved: Ferrie v. Public Administrator, 3 Bradf. 249.

⁹ Goddard's Estate, 94 N. Y. 544, 552.

¹⁰ Because an individual is preferable to a corporation: Goddard v. Public Administrator, 1 Dem. 480, 483.

¹¹ Estate of Hyde, 64 Cal. 228; *In re Muersing*, 103 Cal. 585. One who is the only next of kin, but disqualified because a non-resident alien, cannot by power of attorney authorize another to act as administrator. In such case the public administrator is entitled to administer: Sutton v. Public Admr., 4 Dem. 33. See also *In re Garber*, 74 Cal. 338.

¹² *In re McLaughlin*, 103 Cal. 459.

¹³ Rosenthal v. Prussing, 108 Ill. 128.

¹⁴ *In re Ming*, 15 Mont. 79, De Witt, J., dissenting.

¹⁵ If a public administrator, who is also an heir, is appointed under such circum-

heirs in the State;¹ and the temporary absence from the State of the widow or heirs does not authorize the appointment of the public administrator.² His right to be appointed exists only where there is a vacancy in the administration; he has no authority in law to provoke the removal of an executor or administrator.³

§ 181. **Administrators Pendente Lite.**—The authority of testamentary courts to grant administration *pendente lite*—during a controversy concerning the right to the administration—seems to have always been admitted; and since the case of *Walker v. Woolaston*,⁴ the power of the court to grant administration *pendente lite* in cases touching an executorship also has been settled.⁵ The safety of the estate requires that some person be charged with the duty and armed with the necessary authority to protect and preserve it until the termination *of the contest touching the administration or executorship [*401] shall place it in the charge of the permanent administrator or executor;⁶ hence they are also known as administrators *ad colligendum*, and the general duties of such an administrator have been described as being simply to represent the estate during the pendency of the litigation and to see that no detriment comes to the goods or effects of the estate,⁷ and administrators *pendente lite* compared to receivers in chancery.⁸ Their authority ceases, of course, upon the termination of the contest,⁹ and they must then surrender the estate into the hands of the rightful representative.¹⁰ But until such termination of their office they may maintain suits for debts due the deceased, and bring ejectment for leasehold estates against the heirs, next of kin, or any other person who may be in

stances, it will be assumed that he was appointed as one of the heirs: Succession of Bougère, 30 La. An. 422.

¹ Succession of Henry, 31 La. An. 555.

² Succession of Longuefosse, 34 La. An. 583. To same effect, Succession of Smith, 3 So. R. (La.) 539.

³ Succession of Burnside, 34 La. An. 728; Succession of Withers, 45 La. An. 556.

⁴ 2 P. Wms. 576, decided in K. B., on error from C. P., Trin. T., 1731.

⁵ Wms. Ex. [495].

⁶ *Walker v. Dougherty*, 14 Ga. 653, 656; *Sarle v. Court of Probate*, 7 R. I. 270, 274; *Gresham v. Pyron*, 17 Ga. 263, 265; *Crozier v. Goodwin*, 1 Lea, 368; *Lawrence v. Parsons*, 27 How. Pr. 26; Succession of De Flechier, 1 La. An. 20; *Flora v. Mennice*, 12 Ala. 836; *Satterwhite v. Carson*, 3 Ired. L. 549, 553; *Robinson's Estate*, 12 Phil. 14.

⁷ 3 Redf. on Wills, 108, pl. 2, 3.

⁸ Schoul. Ex. & Adm. § 134.

⁹ If it is desired to have the administrator *pendente lite* act as general administrator after the contest is decided, he must receive a new appointment as general administrator: *Cole v. Wooden*, 18 N. J. L. 15, 19, citing *Piggot's Case*, 5 Rep. 29. See also *Munnikhuysen v. Magraw*, 57 Md. 172, 195, and *Lilly v. Menke*, 126 Mo. 190, 221; *Baldwin v. Mitchell*, 86 Md. 379.

¹⁰ *Ellmaker's Estate*, 4 Watts, 34, 36, citing *Commonwealth v. Mateer*, 16 S. & R. 416, and *Adair v. Shaw*, 1 Sch. & Lef. 243, 254; *State v. Craddock*, 7 Harr. & John. 40; *Ro Bards v. Lamb*, 89 Mo. 303, 311, holding that notice of settlement by the administrator *pendente lite* with the regular executor need not be given. If there be an appeal, the suit is not at an end until the appeal is determined: *Brown v. Ryder*, 42 N. J. Eq. 356; *post*, ch. lix., on appeals.

possession¹ or pay the widow's award.² And where a fire insurance policy is payable to the legal representative and proof of loss must be made and suit brought within a certain time, a temporary administrator should be appointed to collect thereunder if for any reason the appointment of the regular representative cannot be made within the time.³ Whatever they may lawfully do is binding upon the estate, and the authority of the subsequently appointed rightful administrator or executor is confined to so much of the estate as may remain unadministered.⁴ In the absence of statutory authority, they have no power other than may be necessary to collect the effects, not even to invest or distribute them;⁵ nor to pay legacies,⁶ or debts,⁷ but if they were paid *bona fide*, they [*402] will be allowed.⁸ But the powers of administrators **pendente lite* are enlarged by the English probate act,⁹ to include all the rights and powers of a general administrator except the right of distributing the residue,¹⁰ and the tendency in America is in the same direction.¹¹

Administrators *pendente lite* are officers of the court, and not the mere nominees or agents of the parties on whose recommendation they are selected;¹² hence they must give bond, although administration be granted jointly to the nominees of the two litigating parties.¹³ It is said by Judge Redfield that the nominee of neither party should, as a general rule, be appointed,¹⁴ but that such may be done out of regard to special fitness;¹⁵ and, *a fortiori*, where both parties agree.¹⁶ In England, the probate court will refuse to appoint

¹ Matter of Colvin, 3 Md. Ch. 278, 295; Ewing v. Moses, 50 Ga. 264. In Libby v. Cobb, 76 Me. 471, such an administrator was allowed, under the circumstances, to redeem his intestate's land from a mortgage.

² *In re Welch*, 106 Cal. 427.

³ *Matthews v. Am. C. Co.*, 154 N. Y. 449.

⁴ *Patton's Appeal*, 31 Pa. St. 465.

⁵ 3 Redf. 108, pl. 3, citing *Gallivan v. Evans*, 1 Ball & Beatty, 191; *Langford v. Langford*, 82 Ga. 202; *In re Welch*, 106 Cal. 427, 433; *Lilly v. Menke*, *supra* (the two last-cited cases denying the right of the administrator *pendente lite* to make partial distribution); *Kaminer v. Hope*, 9 S. C. 253, 258. In a second appeal of the same case, 18 S. C. 561, 574, it is held that the administrator *pendente lite* may bring actions to recover debts due his intestate estate.

⁶ *Wms. Ex.* [499]; *Welch v. Adams*, 152 Mass. 74, 85.

⁷ *McIver, J.*, in *Kaminer v. Hope*, 18

S. C. 561, 576, citing *Stevenson v. Wilcox*, 16 S. C. 432. See also *Henry v. Superior Court*, 93 Cal. 569. Nor can he mortgage the real estate: *Duryea v. Mackey*, 151 N. Y. 204. An order of court directing the special administrator to pay a debt is void: *State v. Court*, 18 Mont. 481.

⁸ *Kaminer v. Hope*, *supra*, citing *Adair v. Shaw*, 1 Sch. & Lef. 243, 254.

⁹ 20 & 21 Vict. c. 77, § 70.

¹⁰ *Tichborne v. Tichborne*, L. R. 2 P. & D. 41.

¹¹ *Benson v. Wolf*, 43 N. J. L. 78; *In re Duncan*, 3 Redf. 153; *Cadman v. Richards*, 13 Neb. 383.

¹² *Wms. Ex.* [498]; *Stanley v. Bernes*, 1 Hagg. 221.

¹³ *Stanley v. Bernes*, *supra*; *Matter of Colvin*, 3 Md. Ch. 278, 297.

¹⁴ 3 Redf. on Wills, 109, pl. 6. An indifferent person should be selected: *Mootrie v. Hunt*, 4 Bradf. 173.

¹⁵ *Young v. Brown*, 1 Hagg. 53.

¹⁶ *Schoul. Ex. & Adm.*, § 134, note (3); *Wms. Ex.* [497], note (i).

an administrator *pendente lite* when the contest does not affect the rights of the executors;¹ in Missouri, on the contrary, the statute is construed as making it obligatory upon the probate court to appoint some person administrator *pendente lite* other than the person charged with the execution of the will, whether this be an executor or an administrator *cum testamento annexo*, whenever a contest of the will exists.² In Tennessee, an administrator *pendente lite* appointed by a chancery court is held to possess all the powers of a general administrator, and no other administration can be granted to succeed him, unless upon his resignation or removal.³

Letters of general administration granted pending the contest of a will are null and void, and cannot be supported as a grant of administration *pendente lite*;⁴ nor can there be a valid grant of administration *pendente lite* after a general administrator has fully settled the estate.⁵

* As to the privity between administrators *pendente lite* [* 403] and general administrators, there will be occasion to treat hereafter.⁶

§ 182. **Administrators durante Minore Ætate.**—The different classes of administration which have been the subject of discussion

Distinction between administrators essential to the administration, and such as are necessary under conditions peculiar to the common law.

in the preceding sections of this chapter are as essential, and therefore as common, in this country as in England. The functions accorded to each correspond to some peculiar condition of the estate, or of the parties interested therein, and are clearly distinguishable on essential grounds; but in their aggregate they are indispensable to the full administration of the property of deceased persons, which may require their exercise in the one

or other form. In addition to these classes of administration, there are others known to the common law, and of importance in England, which are not so important in America, because the theory of administration differs in the two countries in some important particulars, chief among which is the time during which the authority of personal representatives continues. In England the administration extends, in general, to the whole personal estate of the deceased, and terminates only with the life of the grantee; while the authority

¹ Mortimer v. Paull, L. R. 2 P. & D. 85. So in New York, other things being equal, it is said that considerations of economy would demand that the one named as executor in a disputed will should be appointed: Haas v. Childs, 4 Dem. 137. In granting letters of administration the surrogate is not limited in making his selection to persons entitled to ordinary administration under the statute: Plath's Estate, 56 Hun, 223.

² Lamb v. Helm, 56 Mo. 420, 430, citing and approving Rogers v. Dively, 51 Mo. 193. See also State v. Moehlenkamp, 133 Mo. 134.

³ Todd v. Wright, 12 Heisk. 442, 447.

⁴ Slade v. Washburn, 3 Ired. L. 557, 562; Cummings' Appeal, 11 Mont. 196.

⁵ Fisk v. Norvel, 9 Tex. 13, 17.

⁶ See *post*, § 354.

of limited administrators is confined to a particular extent of time, or to a specified subject-matter.¹ At the common law, too, executors, and at one period of time administrators, possessed an interest in the *residuum* of the estates in their charge which has rarely or never been recognized in the United States.² It is the policy in this country, declared and emphasized by the statutes of the several States, echoed by the courts, and warmly approved by the people, to reduce the time allowed executors and administrators to close up their administrations to the briefest period compatible with justice to creditors. In consequence of this policy, the more speedy settlement of estates has greatly reduced the ratio of cases giving rise to questions involving the necessity of special administrators; and the right to administer is itself of far less importance under American statutes than it was at common law. Hence the American

policy is to discourage grants of limited in favor of full administration, whether original

American policy to discourage special administrators.

or *de bonis non*, in testate or intestate estates.³ Nevertheless, it sometimes happens that special administrators are necessary to the accomplishment of justice, and limited administrations are provided for by the statutes of many States, or recognized as existing at common law.

Thus it may happen that a person nominated sole executor, or he to whom the right of administration has devolved under the statute, may be within age at the time of the testator's or intestate's death. In such case a peculiar administration was grantable at common law, known as *durante minore ætate*, — during the minority of the executor or administrator entitled to the administration;⁴ and the like provisions exist in the American States,⁵ distinguishing, in some instances, between the rights of executors and those of administrators.⁶ The grant in such cases is usually to the guardian of the minor;⁷ but the selection is entirely within the sound discretion of the court.⁸

¹ Wms. Ex. [479].

² See *post*, § 352.

³ Schoul. Ex. & Adm. § 135; 3 Redf. on Wills, 113, pl. 5.

⁴ Wms. Ex. [479]; Wallis v. Wallis, 1 Winst. 78; Bell, J., in Taylor v. Barron, 35 N. H. 484, 493; Collins v. Spear, Walk. (Miss.) 310.

⁵ 3 Redf. on Wills, 104, pl. 1.

⁶ *E. g.* in Missouri, where administration *durante minore ætate* will be granted in case of a minor executor, but the law is silent as to minor administrators: Rev. St. 1889, § 13.

⁷ 3 Redf. on Wills, 104, pl. 2, citing Brotherton v. Hellier, 2 Cas. Temp. Lee,

131; *In re Sartoris*, 1 Curt. 910; Wms. Ex. [481], and authorities. By statute in New York: *Blanch v. Morrison*, 4 Dem. 297; Louisiana: *Boudreaux' Succession*, 42 La. An. 296; California: *In re Woods*, 97 Cal. 428; Nevada: *In re Nickals*, 21 Nev. 462 (holding, however, that the right does not extend to a guardian appointed in another State); Montana: *Stewart's Estate*, 18 Mont. 595 (holding the statute inapplicable to a surviving minor husband or wife who may nominate an administrator under another statute).

⁸ *Pitcher v. Armat*, 5 How. (Miss.) 288, 289; Wms. [480], citing *Briers v. Goddard*, Hob. 250; *Thomas v. Butler*, Vent.

Administrators during minority are said to possess all the authority, for the time being, of general administrators,¹ whatever may have been the prevailing opinion in earlier times;² their acts are binding upon the estate, and when their office has expired by reason of the majority of the executor or administrator in his own right, they are liable to creditors for *devastavit*,³ but only to the executor or administrator for the assets; and if he has duly administered and turned over the surplus, he may show this under the plea of *plene administravit*⁴ in defence of a suit by creditors.

§ 183. **Administrators durante Absentia.** — For a reason similar to that which requires the grant of administration *durante*

minore ætate, administrators are sometimes [*405] appointed to take charge of estates during the temporary absence from the State of the executor or next of kin entitled to the administration.⁵ At common law this class of administrators can be appointed only

before probate of the will, or before the grant of original letters of administration;⁶ although in England the spiritual courts were enabled by statute to grant special administration where the executor to whom probate had been granted had absented himself from the jurisdiction of the English courts.⁷ Such authority is not vested

in American probate courts.⁸ The usual course in this country is to treat prolonged absence from the State by an executor or administrator who has made no provision to be represented, as a cause for his removal and the appointment of an administrator *de bonis non*; and even in the case of absence before probate or grant of general administration, it is more usual, in the absence of statutory provisions directing a different course, to disregard the absent executor or next of kin and appoint a general administrator at once.⁹

In those of the States in which non-residents are competent to

217, 219; *West v. Willby*, 3 Phillim. 374, 379.

¹ 3 Redf. 106, pl. 4; *Schoul. Ex.* § 132.

² *Wms. Ex.* [488] *et seq.*, citing numerous authorities.

³ *Wms. Ex.* [492], citing *Bull, N. P.* 145; *Palmer v. Litherland*, Latch, 160; *Packman's Case*, 6 Co. 19; *Chandler v. Thompson*, Hob. 265 b, 266; *Lawson v. Crofts*, 1 Sid. 57.

⁴ *Anon.*, 1 Frem. 150; *Brooking v. Jennings*, 1 Mod. 174.

⁵ *Ritchie v. McAuslin*, 1 Hayw. 220; *Willing v. Perot*, 5 Rawle, 264.

⁶ *Wms. Ex.* [502], citing 3 Bac. Abr. 56, tit. Executors, G; *Clare v. Hedges* (3 W. & M.), cited in 1 Lutw. 342; *Lord Holt*,

in *Slater v. May*, 2 Ld. Raym. 1071, saying that this administration stood upon the same reason as an administration *durante minore ætate*, viz. that there should be a person to manage the estate of the testator till the person appointed by him is able.

⁷ By statute 38 Geo. III. c. 87 (usually called Simeon's Act).

⁸ *Griffith v. Frazier*, 8 Cr. 9, 21, citing the manuscript opinion of the court of appeals of South Carolina in *Ford v. Travis*, deciding the grant of administration after probate of a will to be void, although the executor is absent.

⁹ 3 Redf. on Wills, 111, pl. 2; *Schoul. Ex.* § 133. See *ante*, § 182.

act as executors and administrators, the grant may, of course, be to such non-resident, or to his attorney or nominee; but such grants do not constitute administrators *durante absentia*, whose office is temporary, ceasing upon the return of the executor or administrator originally entitled.¹

§ 184. **Other Temporary and Limited Administrators.** — Several other instances of temporary or special administrations may be mentioned, a list of which is furnished in Williams's treatise on Executors and Administrators;² Schouler mentions them under the head of "Special Administrations for Limited and Special [* 406] * Purposes,"³ and Redfield says of them, that as a general thing "these limited administrations seldom or never obtain in the American practice, the probate courts preferring, for the convenience and security of all concerned, to have the administration of the settlement of estates as simple as practicable."⁴

It seems necessary, however, to refer briefly to the nature of these peculiar administrations as recognized at common law and in some of the States, to avoid expense and complication, and accomplish the protection of estates under peculiar and unusual circumstances.

Temporary administration becomes necessary if the executor appointed is directed to take charge of the estate at a time mentioned by the testator, and the latter die before the time so mentioned;⁵ in such case the office of the administrator appointed until the efflux of such time will correspond exactly to that of an administrator *durante minore ætate*. So where it is known that there is a will, which cannot at the time be produced for probate, limited administration may be necessary until its production;⁶ or where the executor fails to appear, until such time as he comes and proves the will,⁷ or till a lost will be found;⁸ or during incapacity of executor or next of kin entitled to administration.⁹

Temporary administrator appointed if executor die before a certain time.

There may be, also, a grant of administration limited to certain specific effects of the deceased, while the general administration may be committed to a different person;¹⁰ a testator may appoint different

¹ Schoul. Ex. § 133, citing Rainsford v. Taynton, 7 Ves. 460, 466.

² Wms. [513].

³ Schoul. Ex. § 135.

⁴ 3 Redf. on Wills, 113, pl. 5.

⁵ Wms. Ex. [249, 250].

⁶ Goods of Metcalfe, 1 Add. 343.

⁷ Wms. Ex. [515], citing 1 Gibs. Cod. 574; see also Howell v. Metcalfe, 2 Add. 348, 350.

⁸ Goods of Campbell, 2 Hagg. 555.

⁹ Hills v. Mills, 1 Salk. 36; Toller, 99;

Anon., 1 Cas. Temp. Lee, 625; Goods of Phillips, 2 Add. 336, note (b); Goods of Milnes, 3 Add. 55; *Ex parte Evelyn*, 2 My. & K. 3, 4; Goods of Joseph, 1 Curt. 907; Goods of Southmead, 3 Curt. 28. In California, where one entitled to administer is a *non compos*, his guardian may be appointed under the statute: *In re McLaughlin*, 103 Cal. 429.

¹⁰ McNairy v. Bell, 6 Yerg. 302, 304; Jordan v. Polk, 1 Sneed, 430, 434; Goods of Bion, 3 Curt. 739.

executors as to different parts of his estate in the same country;¹ and where an executor has not qualified to execute a will disposing of part of the estate only, special administration may be granted as to so much of the estate as does not pass by the will.² But such grants are said to be entirely exceptional, and should not be made unless a very strong reason be given.³

*Special administrators, known as administrators *ad litem*, [*407] are sometimes appointed for the sole purpose of defending or prosecuting particular suits instituted by or against a person who may die while such suit is pending;⁴ or where a pressing necessity is shown for carrying on proceedings in chancery, and there is no general personal representative;⁵ or where the interest of the general administrator or executor conflicts with that of the estate.⁶ It has been held that probate courts have inherent power to grant limited administration, within their discretion, whenever it is necessary for the purposes of justice;⁷ but such administrators possess no powers except such as are specially granted by the probate judge at the time of his appointment, and should not be kept in office longer than may be necessary for the appointment of a general administrator.⁸ Special administrators are limited in their powers to the collection and preservation of the property of the testator or intestate until demanded by an executor or administrator duly authorized to administer the same; they are not required to file any inventory, and have no power to pay debts, or allow claims against the estate; nor have they authority to enter into an agreed case in relation to money collected by them.⁹

In Michigan the probate judge is granted almost absolute discre-

¹ Dorsey, J., in *Hunter v. Bryson*, 5 Gill & J. 483, 488.

² *Dean v. Biggers*, 27 Ga. 73, 75. But generally, in America, executors administer as well on intestate as testate personality: *post*, § 229.

³ Wms. Ex. [520]; *Goods of Watts*, 1 Sw. & Tr. 538; *Goods of Somerset*, L. R. 1 P. & D. 350.

⁴ *Wade v. Bridges*, 24 Ark. 569, 572; *Lothrop's Case*, 33 N. J. Eq. 246. See *Wolffe v. Eberlein*, 74 Ala. 99, 107; *McKamy v. McNabb*, 97 Tenn. 236, 239.

⁵ Wms. Ex. [522], citing *Goods of the Elector of Hesse*, 1 Hagg. 93; *Harris v. Milburn*, 2 Hagg. 62; *Maclean v. Dawson*, 1 Sw. & Tr. 425; *Hawarden v. Dunlop*, 2 Sw. & Tr. 614; *Woolley v. Gordon*, 3 Phillim. 314; *Goods of Dodgson*, 1 Sw. & Tr. 259; *Ex parte Lyon*, 60 Ala. 650, 653; *McArthur v. Scott*, 113 U. S.

340, 399; *Newman v. Schwerin*, 22 U. S. App. 393.

⁶ Rev. St. Mo. 1889, § 204. The allowance of a claim in disregard of this section is a nullity: *State v. Bidlingmaier*, 26 Mo. 483; see *post*, § 395, p. *821. So where litigation ensues between estates having the same administrator: *Denning v. Todd*, 91 Tenn. 422.

⁷ *Martin v. Dry Dock Co.*, 92 N. Y. 70; *per Gray, J.*, in *McArthur v. Scott*, 113 U. S. 340, 399.

⁸ *Dull v. Drake*, 68 Tex. 205, 207. When appointed to act until the succeeding term, and suit is commenced within that time, and judgment rendered at the next term, it will be presumed, in Texas, that the appointment was renewed, so as to validate the judgment: *Williams v. Bank*, 91 Tex. 651.

⁹ *Tomlinson v. Wright*, 12 Ind. App. 292; *State v. Wright*, 16 Ind. App. 662.

tion to appoint a special administrator.¹ In Texas the testator may direct that no other action shall be had, in the court having testamentary jurisdiction, in relation to the settlement of his estate, than the probating and recording of the will, return of an inventory, appraisement, and list of claims of his estate; the executor of such a will is known as an "independent executor,"² and the management of the estate thereunder is recognized as administration.³ An independent executor can sell any property of the estate without an order of court, when necessary to pay debts.⁴

¹ And no appeal lies from such appointment: *Greece v. Helm*, 91 Mich. 450 (holding that a special administrator could, under the circumstances, compromise a claim in favor of the estate).

² *Holmes v. Johns*, 56 Tex. 41, 51; *Dwyer v. Kalteyer*, 68 Tex. 554, 563.

³ *Todd v. Willis*, 66 Tex. 704.

⁴ *Howard v. Johnson*, 69 Tex. 655, 659.

*TITLE THIRD.

[* 408]

OF THE DEVOLUTION TO THE LEGAL REPRESENTATIVES.

PART FIRST.

OF THE ESTATE WITHOUT OFFICIAL REPRESENTATION.

CHAPTER XX.

WHAT MAY BE DONE BEFORE PROBATE OR GRANT OF LETTERS.

§ 185. To whom the Real and to whom the Personal Property

Real estate descends to heir or devisee.

descends. — Upon the death of an owner of property his real estate descends, at common law, to his heirs or devisees, subject, under a series of English statutes, to be converted into assets for the payment of the owner's debts, if the personalty be insufficient for that purpose. This liability, however, does not deflect the course of descent: the personal representative possesses only the naked power to sell or lease the real estate, if it become necessary, to pay debts, and until this power is executed, by order of the court having jurisdiction, the title and its defence, the possession, rents, and profits, belong to the heirs and devisees.¹ The title of the heir or devisee vests instantly upon the death of the ancestor or testator; and when the executor or administrator sells, the sale does not relate back to the death of the deceased, but takes effect from the time when made.²

Exception in some of the States.

The law is substantially the same in * most of the American [* 409] States, although some of them have abolished the artificial common-law rule distinguishing, in this respect, between real and personal estate, and subject both classes of property alike to the title of personal representatives for the pur-

¹ See *post*, §§ 337 *et seq.*, and §§ 463 *et seq.*

² *Boynnton v. Peterborough R. R. Co.*, 4 Cush. 467, 469.

pose of administration. These exceptions will be more conveniently noted in connection with the subject of the liability of real estate for the debts of its deceased owner.¹

The personal estate of a decedent, however, passes, as at common law, so in all the States, with the exception, in some particulars, of Louisiana, to the executor or administrator.² This doctrine is so universally admitted that it would be useless to cite any of the numerous authorities so holding.³

Personal property descends to the personal representatives.

We have already seen, however, that as to the time when the personal estate vests in the representatives there is, at common law, a broad distinction between executors and administrators.⁴ It results from the English doctrine ascribing the executor's authority to the will itself, of which the probate is but the authenticated evidence,⁵ that the property of the deceased vests in the executor from the moment of the testator's death;⁶ while the administrator, whose sole source of authority is the appointment by the probate court, can have no power to act before the grant of letters,⁷ although it is said that, when appointed, his title relates back to the death of the intestate or testator,⁸ as the probate, when produced, is also said to have relation to the testator's death.⁹ Upon these principles, it is said that "the executor, before he proves the will in the probate court, may do almost all the acts which are incidental to his office, except only some of those which [* 410] * relate to suits."¹⁰ He may even commence an action before the probate, and it was enough that he had obtained letters testamentary and made *profert* of them at the time of the declaration.¹¹

Personal estate vests in executor at testator's death;

in administrator from time of his appointment.

But title and probate both relate back to time of death of the deceased.

In England executor may act before probate of the will.

¹ *Post*, ch. 1; see §§ 337 *et seq.*, where a list of the States is given, and § 276.

² "By the laws of this realm," says Swinburne (pt. 6, § 3, pl. 5), "as the heir hath not to deal with the goods and chattels of the deceased, no more hath the executor to do with the lands, tenements, and hereditaments."

³ The fundamental difference between the title of personal representatives and of guardians, respecting the personalty, is pointed out in Woerner on Guardianship, § 53; *q. v.*

⁴ *Ante*, §§ 171, 172.

⁵ *Ex parte* Fuller, 2 Sto. 327, 332; "Letters testamentary are merely the evidence establishing that the executor has been duly qualified to act": Succession of Vogel, 20 La. An. 81, 82

⁶ *Ante*, § 172.

⁷ *Rand v. Hubbard*, 4 Met. (Mass.) 252, 256.

⁸ *Ante*, § 173; *Drury v. Natick*, 10 Allen, 169, 174.

⁹ See *ante*, § 172.

¹⁰ *Wms. Ex.* [302]. An executor can maintain a suit only by virtue of his letters testamentary: *Dixon v. Ramsay*, 3 Cr. 319, 323.

¹¹ *Richards v. Pierce*, 44 Mich. 444, and cases cited; *Thomas v. Cameron*, 16 Wend. 579, 580, citing *Com. Dig. Administration*, B, 9; *Bac. Abr. Ex'rs* and *Adm'rs*, E, p. 1, 14; *Humbert v. Wurster*, 22 Hun, 405, 406; *Seabrook v. Freeman*, 3 McC. 371. In Maine he may bring an action of trespass before probate: *Hathorn v. Eaton*, 70 Me. 219.

§ 186. Authority of Executors before Grant of Letters Testamentary. — In most of the American States executors are required to

In America executor must qualify before he can act;

qualify by giving bond and taking the oath of office; until they have complied with these conditions they have no legal power to act,¹ except decently to bury the deceased and to do what may be necessary to preserve the estate.²

Where the statute authorizes the executor to act without bond, the grant of letters testamentary by the probate court is the source of his authority, which does not depend for its validity upon the manual issuance of the letters.³ Hence the sale or transfer of prop-

erty by an executor who has not qualified is void,⁴ and his assent to a specific legacy does not pass the legal title to the thing bequeathed.⁵ But a person nominated as executor has sufficient interest in the estate to demand that one acting as executor under a former will of the same testator shall give bond pending the proceeding to establish the later will,⁶ and to appeal from the refusal to grant probate;⁷ and it has also been held that a foreign executor may, without probate or grant of letters in the forum of the debtor, make demand for the payment of a promissory note to his testator, so as to charge the indorser.⁸ It has also been held that an executor before probate, if legally competent to qualify, may be treated as representing his estate so far as relates to acts in which he is merely passive, such as receiving notice to an indorser of the dishonor of a note.⁹

and cannot give title to property of the testator before grant of letters, nor assent to a legacy; but may demand bond, and appeal from refusal to grant probate.

It has also been held that an executor before probate, if legally competent to qualify, may be treated as representing his estate so far as relates to acts in which he is merely passive, such as receiving notice to an indorser of the dishonor of a note.⁹

* In Oregon the sale of property by executors who had not [* 411] qualified was held good, on the ground that the legal estate was vested in them merely for the purpose of sale and conveyance;¹⁰

¹ Gardner v. Gantt, 19 Ala. 666, 670, citing earlier Alabama cases; Wood v. Cosby, 76 Ala. 557; Diamond v. Shell, 15 Ark. 26; Echols v. Barrett, 6 Ga. 443, 446; Mitchell v. Rice, 6 J. J. Marsh. 623, 627; McKeen v. Frost, 46 Me. 239, 248; Stagg v. Green, 47 Mo. 500; Fay v. Reager, 2 Sneed, 200, 203; Kittredge v. Folsom, 8 N. H. 98, 111; Wood v. Sparks, 1 Dev. & B. 389, 396; Trask v. Donoghue, 1 Aik. 370, 373.

² McDearmon v. Maxfield, 38 Ark. 631, 636; Killebrew v. Murphy, 3 Heisk. 546, 553; Luscomb v. Ballard, 5 Gray, 403, 406. As to the acts rendering one liable as executor *de son tort*, see *post*, §§ 189-191.

³ Ludlow v. Flournoy, 34 Ark. 451, 461.

⁴ Monroe v. James, 4 Munf. 194, 200; Humbert v. Wurster, 22 Hun, 405; Car-

ter v. Carter, 10 B. Mon. 327, 330; Gay v. Minot, 3 Cush. 352.

⁵ Martin v. Peck, 2 Yerg. 298.

⁶ Cunningham v. Souza, 1 Redf. 462.

⁷ Shirley v. Healds, 34 N. H. 407, 410.

⁸ Rand v. Hubbard, 4 Met. (Mass.) 252, 258.

⁹ Schoenberger v. Lancaster, 28 Pa. St. 459; Drexler v. McGlynn, 99 Cal. 143. But notice of non-payment is insufficient when given to one nominated as executor after his refusal to act and the appointment of a special administrator: Goodnow v. Warren, 122 Mass. 79; and notice to one afterward appointed administrator is insufficient: Mathewson v. Stratford Bank, 45 N. H. 106, 108. See as to protest and notice of dishonor of notes, *post*, § 327 a.

¹⁰ Hogan v. Wyman, 2 Oreg. 302, 304.

and in South Carolina the common-law doctrine seems to be still recognized, according to which the executor may, before probate, possess himself of the property of the testator, pay debts and legacies, give releases, maintain trespass, trover, or detinue for goods of the estate in his possession, and sell, give away, or otherwise dispose of the property of the testator.¹ Similarly in Maine,² and New Jersey.³

§ 187. Authority of Administrators before Grant of Letters. —

It is, of course, inaccurate to predicate any authority of an administrator who is shown by the statement not to be an administrator; the phrase is employed to designate those persons who, having a legal preference or exclusive right to the appointment as administrator, act for the protection and in the interest of the estate in anticipation of such appointment. The principle upon which the acts of an executor are validated upon subsequent probate of the will or grant of letters testamentary is extended to administrators, and has been enlarged upon in an earlier chapter treating of the nature of the title of executors and administrators.⁴ The decisive test to ascertain whether the acts done before appointment are legalized or ratified by the subsequent grant of administration is whether such acts would have been valid had he been the rightful administrator;⁵ the consequences both to the person acting and to the estate

Acts before appointment which would be valid after appointment are legalized by subsequent grant of letters.

must be the same as if he had been legally in [* 412] charge of the estate.⁶ The doctrine is stated * to be, that the title to the personal property of a decedent is in abeyance until his executor qualifies, or an administrator is appointed, when it vests in him by relation from the time of the death.⁷ It has already been pointed out, that this doctrine is a fic-

¹ *Magwood v. Legge*, Harp. 116, 119. It is held in this case that any act which would constitute him executor *de son tort*, as taking possession of the goods and converting them to his own use, or disposing of them to another, etc., is evidence of the executor's acceptance of the trust: p. 119; but in a later case it is said that, when executors are appointed to sell and convey lands, a neglect to qualify is *prima facie* evidence of a refusal to act, and will validate a sale made by the acting executors: *Uldrick v. Simpson*, 1 S. C. 283, 286. It is so held in Tennessee: *Drane v. Bayliss*, 1 Humph. 174; *Robertson v. Gaines*, 2 Humph. 367, 381.

² *Hathorn v. Eaton*, 70 Me. 219, 220.

³ *Thiefes v. Mason*, 55 N. J. Eq. 456.

⁴ *Ante*, ch. xviii. §§ 172, 173, and authorities there cited.

⁵ *Outlaw v. Farmer*, 71 N. C. 31, 35; *Bellinger v. Ford*, 21 Barb. 311, 314, and authorities cited there; *Gilkey v. Hamilton*, 22 Mich. 283, 286; *Haselden v. Whitesides*, 2 Strobb. 353; *McClure v. People*, 19 Ill. App. 105.

⁶ *Tucker v. Whaley*, 11 R. I. 543, holding a person who bought hay to feed the stock of a decedent, and who was afterward appointed administrator, liable as administrator personally. An action commenced by an administrator before his appointment must necessarily fail: *Garfield v. Hanson*, 57 How. Pr. 331.

⁷ *Per Smith, J.*, in *McDearmon v. Maxfield*, 38 Ark. 631, 636, citing *i. a. Rattoon v. Overacker*, 8 John. 126; *Priest v. Watkins*, 2 Hill (N. Y.), 225.

tion of the law to prevent injustice and injuries to estates, and will never be resorted to where it might unjustly affect the rights of innocent parties intervening, or to recognize or validate unauthorized acts in prejudice of the estate.¹ The status of an executor or administrator acting before grant of probate or letters is very similar to that of an executor *de son tort*, and it will become necessary again to allude to the principle upon which their acts, though unauthorized at the time of commission, become valid and binding upon the estate by the grant of letters to them.²

¹ *Ante*, § 173, and authorities.

² See *post*, ch. xxi. §§ 188 *et seq.*

[* 413]

* CHAPTER XXI.

OF EXECUTORS DE SON TORT.

§ 188. **Definition.** — The common-law doctrine ascribing to an executor authority to act without first qualifying, or going through any ceremony of authentication or induction into office whatever, which might serve as notice to the public of his official character, has given rise in the English law to what Mr. Schouler terms “an official name to an unofficial character; styling as executor *de son tort* — executor in his own wrong — whoever should officiously intermeddle with the personal property or affairs of a deceased person, having received no appointment thereto.”¹ The theory of holding an intermeddler liable in the character which he has himself voluntarily assumed, is not unjust to him, and may be necessary to the protection of the interests of creditors, heirs and legatees of the deceased person, not only because strangers may naturally conclude that the person so acting has a will which he has not yet proved,² but for the substantial reason that, by holding him liable in the assumed character, the remedy of parties injured is, at least at common law, much simplified, and circuity of action avoided. The harshness of the doctrine, which is complained of by American writers, is not apparent from the common-law standpoint; and in some of the States unauthorized intermeddling with the estate of a deceased person is more severely punished than at common law.³ However inapt the term and incon-

Theory of the doctrine of executor *de son tort*.

Still recognized in most States.

¹ Schoul. Ex. § 184.

² “And in all actions by creditors against such an officious intruder, he shall be named an executor, generally; for the most obvious conclusion which strangers can form from his conduct is, that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof”: 2 Bla. Comm. 507, citing 5 Rep. 31; 12 Mod. 471.

³ The liability of an executor is, at common law, coextensive with the value of the property converted; in New Hampshire it is double such value; in some other States a penalty is superadded to the liability.

⁴ See *post*, § 198, where the States are mentioned in which the doctrine is not in force. Mr. Schouler (*supra*) says: “This designation is inapt, since it applies the term ‘executor’ as well to intestate as to testate estates, and signifies, moreover, that the person who intended his services had no legal authority in any sense.” Mr. Redfield (3 Redf. on Wills, p. 21, note 6) says: “The American courts have sometimes held such persons liable to an action at the suit of creditors of the estate. But there has always been manifested a marked disposition here to narrow the range of such responsibility, and virtually to expunge the term from the law. It is,

an essential * element of the law of administration in most of [* 414] the American States, being recognized as in full force in Alabama,¹ Connecticut,² Delaware,³ District of Columbia,⁴ Georgia,⁵ Illinois,⁶ Indiana,⁷ Iowa,⁸ Kentucky,⁹ Louisiana,¹⁰ Maine,¹¹ Maryland,¹² Massachusetts,¹³ Michigan,¹⁴ Mississippi,¹⁵ New Hampshire,¹⁶ New Jersey,¹⁷ New York,¹⁸ Pennsylvania,¹⁹ North Carolina,²⁰ South Carolina,²¹ Tennessee,²² Utah,²³ Vermont,²⁴ and Virginia.²⁵ It is therefore important to define the acts of intermeddling which make one liable in such States, as executor — or, as is sometimes (particularly in Iowa) said, administrator — *de son tort*.

The general definition, as given by Swinburne, Godolphin, and Wentworth, is in these words: "He who takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor, for want of such constitution, substituted by the court to administer."²⁶ Mr. Williams says: "If one who is neither executor nor administrator intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in the law an executor of his own wrong, or, more usually, an executor *de son * tort*."²⁷ In [* 415] New Hampshire, where the statute makes an intermeddler liable in double the value of the property intermeddled with, the rule is laid down that "all acts which assume any particular control over the property, without legal right shown, will make a person executor in his own wrong, as against creditors. Any act which evinces a

in itself, a subject resting upon no just basis of correlative rights and responsibilities, but operates chiefly in the nature of a penalty for intermeddling with the estates of deceased persons. We have devoted no space to the topic, in this work, because it is so nearly obsolete in the American courts that it would seem unjust to the profession to tax them with the expense of what is only speculatively useful, when so much which is practically so has to be omitted."

¹ Simonton v. McLane, 25 Ala. 353.

² Bennett v. Ives, 30 Conn. 329.

³ Wilson v. Hudson, 4 Harr. 168.

⁴ Peters v. Breckenridge, 2 Cr. C. C. 518.

⁵ Barron v. Burney, 38 Ga. 264; Morrow v. Cloud, 77 Ga. 114.

⁶ McClure v. People, 19 Ill. App. 105, 107; Camp v. Elliott, 38 Ill. App. 337.

⁷ Brown v. Sullivan, 22 Ind. 359.

⁸ Elder v. Littler, 15 Iowa, 65. See also French v. French, 91 Iowa, 140.

⁹ Brown v. Durbin, 5 J. J. Marsh. 170.

¹⁰ Succession of Mouton, 3 La. An. 561.

¹¹ White v. Mann, 26 Me. 361.

¹² Neale v. Hagthorp, 3 Bland. Ch. 551, 565; Baumgartner v. Haas, 68 Md. 32.

¹³ Mitchel v. Lunt, 4 Mass. 654.

¹⁴ Damouth v. Klock, 29 Mich. 289.

¹⁵ Hunt v. Drane, 32 Miss. 243; Ellis v. McGee, 63 Miss. 168.

¹⁶ Emery v. Berry, 28 N. H. 473.

¹⁷ Parker v. Thompson, 30 N. J. L. 311.

¹⁸ Scoville v. Post, 3 Edw. 203. But in this State the office of executor *de son tort* is now abolished by statute: 2 Rev. St. 449, § 17; Banks & Bro., 7th ed., p. 2395, § 17.

¹⁹ Crunkleton v. Wilson, 1 Browne, 361.

²⁰ Bailey v. Miller, 5 Ired. L. 444.

²¹ Hubble v. Fogartie, 3 Rich. 413.

²² Mitchell v. Kirk, 3 Sneed, 319.

²³ National Bank v. Lewis, 12 Utah, 84.

²⁴ Walton v. Hall, 66 Vt. 455, 463.

²⁵ Hansford v. Elliott, 9 Leigh, 79.

²⁶ Schoul. Ex. § 184, note (1).

²⁷ Wms. Ex. [257].

legal control, by possession, direction, or otherwise, will, unexplained, make him liable."¹

§ 189. **Acts which create the Liability.**—Very slight circumstances of intermeddling with the goods of a deceased person will make one liable as executor *de son tort*. Mr. Williams alludes to some ancient cases in which the milking of a cow by the widow, taking a dog, a bedstead,² a Bible,³ were held sufficient, as *indicia* of being the representative of the deceased.⁴ Killing the cattle,⁵ using, selling, or giving away the goods,⁶ or taking them in satisfaction of a debt or legacy,⁷ will render one liable as executor *de son tort*. The wife of the deceased taking more apparel than she is entitled to,⁸ or continuing in possession of his goods and using them as her own,⁹ and a daughter carrying on the business with them,¹⁰ [*416] is liable *as executrix *de son tort*;¹¹ and so, it seems, is a husband who retains possession of his deceased wife's property, which she held jointly with the next of kin of her former husband.¹² But there can be no executorship *de son tort* with respect to lands,

Milking a cow;
taking a dog,
a bedstead, a
Bible;
killing cattle,
using, selling,
or giving away
the goods;
taking goods in
satisfaction of a
debt or legacy;
taking apparel;
widow retain-
ing goods of
husband;
husband retain-
ing goods of
wife.
Not in respect
of lands,

¹ Emery v. Berry, 28 N. H. 473, 483, citing, as sustaining the position announced, 2 Bac. Abr. 387; 5 Coke, 33 b; Edwards v. Harben, 2 T. R. 587, 597; Padget v. Priest, 2 T. R. 97; Campbell v. Tousey, 7 Cow. 64; White v. Mann, 26 Me. 361; Wilson v. Hudson, 4 Harr. 168; Hubble v. Fogartie, 3 Rich. 413; 1 Saund. 265, note.

² Robbin's Case, Noy, 69.

³ Toller, 38.

⁴ Schouler deems it absurd that the milking of a cow by the widow of the deceased should expose her to the liability of executrix *de son tort*, not on account of the trivial nature of the transaction, but because milking was in the interest of the estate,—as conducing to the health of the cow, and saving a perishable commodity for account of a representative subsequently appointed. It is probable, however, that the milking was not in the interest, but to the deprivation, of the estate, because acts of kindness and charity never subjected any one, even in the times of Godolphin, Dyer, and Wentworth, who report the above cases, to the hazard of executorship *de son tort*. And the trivial acts complained of were probably looked upon as an indication of the wrong,—the straw moved by the

wind,—not as the wrong itself, unless the articles mentioned were of more than ordinary value.

⁵ Godolphin, pt. 2, c. 8, s. 4.

⁶ Gilchrist, J., in Leach v. Pillsbury, 15 N. H. 137, 139, citing Read's Case, 5 Coke, 34, and Mountford v. Gibson, 4 East, 441. See Baumgartner v. Haas, 68 Md. 32.

⁷ Ewing, J., in Stephens v. Barnett, 7 Dana, 257, 262, citing Bethel v. Stanhope, 1 Cro. Eliz. 810. See also Bacon v. Parker, 12 Conn. 212, 216.

⁸ Wms. Ex. [258], citing Stokes v. Porter, Dyer, 166 b; 1 Roll. Abr. 918; Wentw., c. 14, p. 325, 14th ed.; Godolph., pt. 2, c. 8, s. 1; Swinb., pt. 4, s. 23.

⁹ Madison v. Shockley, 41 Iowa, 451; Hawkins v. Johnson, 4 Blackf. 21, 22.

¹⁰ Hooper v. Summersett, Wightw. 16, as cited by Wms. Ex. [259].

¹¹ The widow was held not liable in an action at law for a debt due from the estate, although she had possession of some goods belonging to the estate: Chandler v. Davidson, 6 Blackf. 367. And where a wife in destitute circumstances uses the property of the absent husband in the support of his family, before any certain news of his death, she is not liable: Brown v. Benight, 3 Blackf. 39, 41. See also *post*, § 191.

¹² Phallon v. Honseal, 3 McCord, Ch. 423.

nor of term in reversion;

but entry upon leasehold in possession creates the liability.

because interference therewith is a wrong to the heir or devisee,¹ nor of a term of years in reversion, because it is incapable of entry.² Entry upon the land leased to the decedent and possession claiming the particular estate constitutes a *tort* executor of a term for years.³

So the heirs of a mortgagee who had not taken possession were held liable as executors *de son tort* for entering to foreclose, and taking the rents and profits, to the extent of the rents received,⁴ and likewise one who, as agent of the mortgagee of a chattel mortgage, after the death of the mortgagor still in possession, takes possession of the mortgaged goods, is liable as executor *de son tort* for all goods seized, sold, and disbursed in excess of the mortgage debt.⁵

Demanding and receiving the debts of the deceased,⁶ or making acquittances for them, is such intermeddling as to create the liability

Collecting debts due to the deceased.

of executor *de son tort*; or even paying the decedent's debts, or the fees for proving his will,⁷ out of the estate;⁸ likewise, if a man sue as executor, or to an action brought against him as such pleads in that character;⁹ or if, voluntarily appearing as executor of a deceased defendant, he adopts the answer of the deceased and contests the issues made on the merits.¹⁰

§ 190. **Status of the Person, and other Circumstances fixing the Liability.** — Mr. Williams cites an English case in which it was held

Master and servant, or principal and agent, may both be liable as executors *de son tort*.

that, if a man's servant sells the goods of the deceased, as well after his death as before, by the direction of the deceased given in his lifetime, and pays the money arising therefrom into the hands of his master, this

makes the master, as well as the servant, * ex- [* 417] ecutor *de son tort*.¹¹ So the agent of an executor

de son tort, collecting the assets with a knowledge that they belong to the testator's estate, and that his principal is not the legal representative, may himself be treated as an executor *de son tort*.¹² It was

¹ Nass v. Van Swearingen, 7 S. & R. 192, 195; King v. Lyman, 1 Root, 104; Mitchel v. Lunt, 4 Mass. 654, 658; Clausen v. Lafrenz, 4 G. Greene, 224; Morrill v. Morrill, 13 Me. 415.

² Wms. [258], citing Kenrick v. Burges, Moore, 126.

³ Mayor of Norwich v. Johnson, 3 Lev. 35; Garth v. Taylor, 1 Freem. 261.

⁴ They were held liable to the mortgagor in a bill to redeem even after the time for redemption, if they had been lawful executors, had expired: Haskins v. Hawkes, 108 Mass. 379, 381.

⁵ Ex parte Davega, 31 S. C. 413.

⁶ Swift v. Martin, 19 Mo. App. 488, 489, 492.

⁷ Wms. [258].

⁸ Paying the decedent's debts with one's own money does not make one executor *de son tort*: Carter v. Robbins, 8 Rich. 29.

⁹ Davis v. Connelly, 4 B. Mon. 136, 140.

¹⁰ National Bank v. Lewis, 12 Utah, 84, 99.

¹¹ Wms. [259], citing Padget v. Priest, 2 T. R. 97.

¹² Sharland v. Mildon, 5 Hare, 468; Ambler v. Lindsay, L. R. 3 Ch. D. 198, 206; Turner v. Child, 1 Dev. L. 331.

held in Missouri that a person cannot be charged as an executor of his own wrong, by reason of acts done as the agent or servant of another;¹ but the opinion in emphatic terms dwells on the innocent character of the defendant's acts, and is hence consistent with the qualification to this statement confining it to cases where the agent was not aware of his principal's want of authority. In this sense it is in harmony with the English and other American cases.²

Creditors of a deceased person, who, knowing that no administration has been granted, receive payment of their claims from the widow, are liable to the administrator subsequently appointed, as executors *de son tort*.³ Donees and vendees holding property under fraudulent gifts or sales to them are liable as executors *de son tort*⁴ to creditors, although they may not be to rightful executors or administrators in States in which the personal representatives are not permitted to avoid the fraudulent conveyances of their testators or intestates.⁵

Creditors who receive payment of their claims from the widow knowing that she is not administratrix; fraudulent donees and vendees.

A person acting under void letters of administration has been described as an executor *de son tort*;⁶ and likewise an administrator *ad colligendum*, who, in excess of his authority as special administrator, sells or disposes of any goods, even though they were otherwise subject to perish, and although his letters *ad colligendum* warranted him thereto; for the judge himself could not confer such authority.⁷

Void letters no relief against liability.

One who administers upon the estate of a fraudulent assignee, and takes possession of the

Administrator of fraudulent assignee liable.

goods assigned, may, upon the death of the assignor, be sued as executor *de son tort* by the creditors of the latter;⁸ but such suit lies against him only in his representative character, not personally.⁹

§ 191. **Acts of Intermeddling which do not create the Liability.**

—There are many acts which a stranger may perform without incurring the hazard of making himself liable as executor *de son tort*;

¹ *Magner v. Ryan*, 19 Mo. 196, 199.

² *Givens v. Higgins*, 4 McCord, 286; *Brown v. Sullivan*, 22 Ind. 359; *Perkins v. Ladd*, 114 Mass. 420, 423.

³ *Mitchell v. Kirk*, 3 Sneed, 319, 321, citing *Mountford v. Gibson*, 4 East, 441.

⁴ *Gleaton v. Lewis*, 24 Ga. 209; *Garner v. Lyles*, 35 Miss. 176, 185; *Allen v. Kimball*, 15 Me. 116; *Sturdivant v. Davis*, 9 Ired. L. 365, 367; *Crunkleton v. Wilson*, 1 Browne, 361, 364; *Clayton v. Tucker*, 20 Ga. 452, 464; *Warren v. Hall*, 6 Dana, 450, 454. But not where the assignment is void by reason of a technical defect, no fraud being charged: *Chattanooga v. Adams*, 81 Ga. 319.

⁵ *Gleaton v. Lewis*, 24 Ga. 209; *Dorsey v. Smithson*, 6 Harr. & J. 61, 64; *Hopkins v. Towns*, 4 B. Mon. 124; *Simonton v. McLane*, 25 Ala. 353; *Tucker v. Williams*, *Dudley* (S. C.), 329.

⁶ *Bradley v. Commonwealth*, 31 Pa. St. 522.

⁷ *Wms. Ex.* [258], citing *Anon. Dyer*, 256 a; *Wentw.*, c. 14, p. 324, 14th ed.; *Godolph.*, pt. 2, c. 8, § 1.

⁸ *McMoline v. Storey*, 4 Dev. & B. 189, 191; *Norfleet v. Riddick*, 3 Dev. L. 221.

⁹ *Alfriend v. Daniel*, 48 Ga. 154.

Acts of charity and kindness, and simple preservation of the property, create no liability.

Widow using assets allowed her by law not liable.

notably, all acts or offices of mere kindness and charity,¹ and looking to the preservation of the property.² Mr. Williams mentions such as locking up the goods for preservation,³ directing the funeral and paying the expenses thereof out of his own means or out of the effects of the deceased,⁴ making an inventory of his property,⁵ feeding his cattle,⁶ repairing his houses, or providing necessities for his children.⁷ Where the property is not greater in amount than is allowed by law for the immediate support of the family, a widow is not liable as executrix *de son tort* for so using the assets;⁸ and so where the * widow supports the family of one absent from home before certain news of his death;⁹ or, being compelled to vacate the premises, moves the furniture, partly to an auction-room to be sold, and partly to another house to be used by her, with the intention of accounting to a proper representative;¹⁰ or where she appropriates the wearing apparel, of less value than debts which she paid,¹¹ or where the assets appropriated will not pay the expense of taking out administration.¹² Courts sometimes refuse to hold one liable as executor *de son tort* who in

¹ *Graves v. Poage*, 17 Mo. 91, 97. Says Judge Gamble, in this case: "It is impossible that any person can believe that it was the defendant's duty to leave the gold and other effects upon the ground or in the tent where Graves died, exposed to every marauder who might pass by. The Israelites were taught better law when they were commanded in this language: Thou shalt not see thy brother's ox or his sheep go astray and hide thyself from them: thou shalt in any case bring them to thy brother. And if thy brother be not nigh unto thee, or if thou know him not, then thou shalt bring it unto thine own house, and it shall be with thee until thy brother seek after it, and thou shalt restore it to him again. In like manner shalt thou do with his ass, and so shalt thou do with his raiment, and with all lost things of thy brother's."

² "Whoever comes into possession of any portion of the personal property of an intestate becomes responsible for it to the administrator when appointed. He cannot safely deliver it to any one else than the administrator, or some one who shows a better right to it than himself. . . . This mere possession of the personal property of a decedent, and consequent duty to preserve and protect it, entitles the possessor to the ordinary legal remedies against a

mere wrongdoer; that is, any one who interferes with the property without a better right": *Cullen v. O'Hara*, 4 Mich. 132, 136, *et seq.*, with numerous authorities. See also *Blodgett v. Converse*, 60 Vt. 410, 419.

³ *Wms. Ex.* [261]; *Godolph.*, pt. 2, c. 8, § 6; *Ib.*, § 3, where a man but took a horse of the deceased and tied him in his own stable: *Wentw. Ex.* 325, 14th ed. See *Brown v. Sullivan*, 22 Ind. 359.

⁴ *Harrison v. Rowley*, 4 Ves. 212, 216, and numerous writers.

⁵ *Godolph.*, pt. 2, c. 8, § 6.

⁶ *Ib.*, § 8.

⁷ *Ib.*, § 6.

⁸ *Craslin v. Baker*, 8 Mo. 437, 441. This case was decided before the enactment of the statute similar in effect to statutes passed in other States, authorizing the probate court to dispense with administration in such cases.

⁹ *Brown v. Benight*, 3 Blackf. 39; *Chandler v. Davidson*, 6 Blackf. 367. See *ante*, § 189.

¹⁰ *Peters v. Leeder*, L. J. 47 Q. B. 573.

¹¹ *Taylor v. Moore*, 47 Conn. 278, the reason given being that by her acts the widow did not injure, but benefited, the estate.

¹² *Bogne v. Watrous*, 59 Conn. 247.

good faith interferes, paying debts and assisting the beneficiaries of the estate.¹

The purchaser from an executor *de son tort* does not by his purchase become executor *de son tort* himself;² and the possession of property under a fair claim of right does not render one liable as such;³ and in such case the *bona fides* is a question of fact referable to the jury, and it is error for the court to decide it.⁴

Purchaser from an executor *de son tort* not himself liable.

No action can be maintained against any one, as executor *de son tort*, who has not interfered with personal property of a deceased person.⁵ The intermeddling with the goods of a partnership after the death of one of the partners does not constitute an executor *de son tort*, because such person is liable to the surviving partner;⁶ nor for setting up a claim against goods of the intestate, and thereby injuring their sale;⁷ nor for paying money found upon the person of the deceased to his administrator in another State.⁸

No one liable who has not himself intermeddled; nor one intermeddling with partnership effects; nor for setting up a claim against the estate.

§ 192. **Coexistence of Executor or Administrator de Jure and de son Tort.** — It is sometimes said that at common law the intermeddling with the goods of an estate, if probate or letters have [* 420] * been granted, does not constitute the intermeddler an executor *de son tort*, because creditors may bring their action against the rightful representative, and the intermeddler is liable as a trespasser.⁹ This statement is to be understood as simply affecting the remedy against one who interferes with the effects or property of an estate in the hands of a legally constituted executor or administrator; the interference is a trespass, and punishable as such.¹⁰ But the liability as executor *de son tort* is not excluded by the fact that there is a

At common law intermeddling with effects in custody of an executor or administrator creates no liability as executor *de son tort*, but as a trespasser.

Existence of a rightful executor does

¹ Portman v. Klemish, 54 Iowa, 198.

² Smith v. Porter, 35 Me. 287, 290, citing 9 Ad. & El. 365 (probably a misquotation); Johnson v. Gaither, Harp. 6; Nesbit v. Taylor, 1 Rice, 296.

³ Smith v. Porter, *supra*, citing Femings v. Jarret, 1 Esp. 335; Densler v. Edwards, 5 Ala. 31, 36; Claussen v. Lafrenz, 4 G. Greene, 224; O'Reilly v. Hendricks, 2 Sm. & M. 388; Debesse v. Napier, 1 McCord. 106; Alexander v. Kelso, 1 Baxt. 5; Baumgartner v. Haas, 68 Md. 32.

⁴ Ward v. Beville, 10 Ala. 197, 202.

⁵ Hence the donee of a voluntary conveyance of real and personal property, who disposed of the same during the lifetime of

the donor, is not so liable: Morrill v. Morrill, 13 Me. 415.

⁶ Hunt v. Drane, 32 Miss. 243; Palmer v. Maxwell, 11 Nebr. 598.

⁷ Barnard v. Gregory, 3 Dev. L. 223.

⁸ Nisbet v. Stewart, 2 Dev. & B. L. 24.

⁹ Wms. Ex. [261], citing Anon., 1 Salk. 313; Godolph., pt. 2, ch. 8, § 3. See also McMorine v. Storey, 3 Dev. & B. 87; Bacon v. Parker, 12 Conn. 212, 216; and remarks, cited by Williams, *supra*, of Lord Kenyon, in Hall v. Elliot, Peake N. P. C. 86, 87, and Sir T. Plumer, M. R., in Tomlin v. Beck, 1 Turn. & R. 438.

¹⁰ Schoul. Ex. § 197, citing 1 Salk. 313, *supra*.

not exclude
liability as
executor *de
son tort*.

lawful representative of the estate. Where a fraudulent grantee is in possession of property conveyed to him in derogation of the rights of creditors, or has become liable by reason of having disposed of such property after the grantor's death, the rightful executor or administrator cannot, in many if not most of the States, proceed against the grantee; the fraudulent transaction being good as against the grantor and all claiming through him. In such States the remedy of the creditors is against such grantee as executor *de son tort*, although there be a lawful executor.¹ And it is stated by Williams, that "though there be a lawful executor or administrator, yet if any other take the goods *claiming them as executor*, or pays debts or legacies, or intermeddles *as executor*, in this case, because of such express claiming to be executor, he may be charged as executor of his own wrong, although there were another executor of right."²

§ 193. **Nature of the Liability of Executors de son Tort.**—An

Executor *de son tort* liable to the rightful executor or administrator, creditor, or legatee; and to next of kin after all debts are paid.

executor *de son tort* has all the liabilities, though none of the privileges, that belong to the character of executor.³ He is liable to be sued by the rightful executor * or administrator,⁴ by a creditor,⁵ or by a legatee;⁶ but not, it seems, to the next of kin, so long as any debts remain unpaid,⁷ though otherwise where there are no debts owing.⁸ It has also been held that the executor *de son tort* cannot be called to account before the probate court;⁹ and in some of the States he is not

¹ Foster v. Nowlin, 4 Mo. 18, 24; Howland v. Dews, R. M. Charl. 383, 387; Dorsey v. Smithson, 6 Harr. & J. 61, 63; Chamberlayne v. Temple, 2 Rand. 384, 397; Shields v. Anderson, 3 Leigh, 729; Osborne v. Moss, 7 Johns. 161, 164, citing Ashby v. Child, Styles, 384. And see authorities cited ante, § 190, p. * 417.

² Wms. Ex. [261], citing Read's case, 5 Co. 34, and other authorities.

³ Schoul. Ex. § 187, quoting Lord Cottenham in Carmichael v. Carmichael, 2 Phill. Ch. 101.

⁴ Muir v. Trustees, &c., 3 Barb. Ch. 477, 479; Stockton v. Wilson, 3 Pa. 129, 130; McCoy v. Payne, 68 Ind. 327, 332, citing Ferguson v. Barnes, 58 Ind. 169; Shaw v. Hallihan, 46 Vt. 389, 393.

⁵ Elder v. Littler, 15 Iowa, 65; Wms. [265], citing Webster v. Webster, 10 Ves. 33; Ambler v. Lindsay, L. R. 3 Ch. D. 198, 207; Cooté v. Whittington, L. R. 16 Eq. 534; Morrow v. Cloud, 77 Ga. 111. Under the Code of Alabama the creditor cannot sue the executor *de son tort*, but

only the rightful representative: Winfrey v. Clarke, 107 Ala. 355. A note given to a creditor of the deceased, by the executor *de son tort*, in renewal of the original debt of the deceased, is on good consideration: French v. French, 91 Iowa, 140. In Georgia, where a wife as executrix *de son tort* of her husband's estate, having sold all the personalty of the estate and left the county with it, sued on a promissory note made to her individually, the defendant was allowed to set off a claim for medical services due him by the decedent, the plaintiff being sole heir of her husband and having no property of her own which could be reached: Harwood v. Andrews, 71 Ga. 784.

⁶ Hansford v. Elliott, 9 Leigh, 79, 85.

⁷ Lee v. Wright, 1 Rawle, 149, 150; Muir v. Trustees, &c., 3 Barb. Ch. 477; Leach v. Pillsbury, 15 N. H. 137, 139.

⁸ Lee v. Gibbons, 14 S. & R. 105, 110, et seq.; Bryant v. Helton, 66 Ga. 477. See, however, Haley v. Thames, 30 S. C. 270.

⁹ Per Tilghman, J., in Peebles' Appeal,

answerable in a direct action by a creditor for the debt, but must be proceeded against in an action to account for the property intermeddled with.¹

The action by a creditor must name him as executor generally;² but his liability is in its nature essentially distinct from that of an executor duly appointed: the one is founded on the principle of lawful authority, the other, whatever may be the form of the action employed, arises out of a wrong done.³ Hence the executor *de son tort* cannot plead the limitation prescribed for actions against executors and administrators,⁴ but is liable as executor of an executor for the debt of the original testator.⁵ If there be also a lawful executor, they may be joined in the suit, or sued severally; but a lawful administrator cannot be joined in the suit with an executor *de son tort*.⁶ But if the executor *de* [* 422] *son tort*, who * became such by reason of holding property fraudulently granted to him by the deceased, is afterward appointed administrator, the creditor has his election to charge him as executor or as administrator.⁷

Action by a creditor.

If the executor *de son tort* should, to a suit by a creditor, plead *ne unques executor*, the issue would, on proof of acts constituting him executor *de son tort*, be found against him, and the judgment thereon would be that the plaintiff recover the debt and costs out of the assets of the testator, if the defendant have so much, but if not, then out of the defendant's own goods.⁸

Judgment if plea of *ne unques executor* be found against him.

Executors *de son tort* are not allowed to retain for their own debts,⁹ although of superior degree to that

Executors *de son tort* cannot

15 S. & R. 39, 41; *Power's Estate*, 14 Phila. 289. See also *Haley v. Thames*, *supra*. The reason given is, that an executor *de son tort* has never acted under an officer having jurisdiction, but under usurped authority only.

¹ *McCoy v. Payne*, 68 Ind. 327, 333, citing *Northwestern Conference v. Myers*, 36 Ind. 375; *Wilson v. Davis*, 37 Ind. 141; *Leonard v. Blair*, 59 Ind. 510.

² *National Bank v. Lewis*, 12 Utah, 84, 101; *Brown v. Durbin*, 5 J. J. Marsh. 170, 172; *Buckminster v. Ingham*, *Brayt*, 116; *Pleasants v. Glasscock*, 1 Sm. & M. Ch. 17, 23; *Gregory v. Forrester*, 1 McCord, Ch. 318, 326; *Lee v. Chase*, 58 Me. 432, 435.

³ *Brown v. Leavitt*, 26 N. H. 493, 495.

⁴ *Brown v. Leavitt*, *supra*.

⁵ *Meyrick v. Anderson*, 14 Ad. & El. (Q. B.) 719, 725.

⁶ *Wms. Ex.* [266], citing *Wentw.* 328,

14th ed.; *Godolph.*, pt. 2, c. 8, § 2; *Com. Dig. Administrator*, c. 3.

⁷ *Stephens v. Barnett*, 7 Dana, 257, 262, citing *Bethel v. Stanhope*, 1 Cro. 810.

⁸ On the same ground upon which a like judgment would go against a rightful executor or administrator, if defeated on the plea of *ne unques*, — because he wilfully pleaded a false plea, — the fact of intermeddling being as fully within his knowledge as that of appointment in the knowledge of an executor *de jure*: *Hubbell v. Fogartie*, 1 Hill (S. C.), L. 167, 169; *Campbell v. Tousey*, 7 Cow. 64, 68; *Peters v. Breckenridge*, 2 Cr. C. C. 518.

⁹ "For otherwise," says *Williams*, p. [269], "the creditors of the deceased would be running a race to take possession of his goods, without taking administration to him." See *Coulter's Case*, 5 Co. 30, cited by *Chapman, C. J.*, in *Carey v. Guillo*, 105 Mass. 18, 21; *Turner v.*

retain for their own debts. of the creditor suing;¹ nor is it a defence that he is a legatee.²

§ 194. **Extent of their Liability to Creditors.**—The liability of an executor *de son tort* does not, at common law, extend beyond the goods which he has administered; for while he is not allowed, by his own wrongful act, to acquire any benefit, yet he is protected, if he pleads properly, for all acts other than those for his own advantage, which a rightful executor might do.³ Thus he may, to an action by a creditor, plead *plene administravit*, or *plene administravit præter*, etc., and support this plea by proof of payment of all just debts to any other creditor in equal or superior degree, as in due course of administration;⁴ and * he is not chargeable, under such plea beyond the assets [* 423] which came to his hands.⁵ And even after action brought he may apply the assets in hand to the payment of a debt of superior degree, and plead such payment in bar of the action;⁶ and he may also give in evidence under the same plea, that he has delivered the assets to the rightful executor or administrator *before* action brought.⁷ An executor *de son tort* may well plead *ne unques executor*, and also *plene administravit*, and have verdict on the latter issue if unsuccessful in the former.⁸ He may deny the authority of the creditor to sue, as being barred by limitation;⁹ and the creditor must affirmatively show that the goods intermeddled with were such as the creditors were entitled to have placed in the hands of an administrator.¹⁰

In America, the liability of executors *de son tort* is, in many of the

Child, 1 Dev. L. 331, 333, citing *Alexander v. Lane*, Yelv. 137; *Kinard v. Young*, 2 Rich. Eq. 247, 252; *Partee v. Caughran*, 9 Yerg. 460; *Shields v. Anderson*, 3 Leigh, 729; *Brown v. Leavitt*, 26 N. H. 493, 497; *Baumgartner v. Haas*, 68 Md. 32.

¹ Wms. [269], citing *Vernon v. Curtis*, 2 H. Bl. 18.

² *Wilbourn v. Wilbourn*, 48 Miss. 38, 45.

³ Wms. [267], and Perkins's note *a*, citing English and American authorities. See *Brown v. Walter*, 58 Ala. 310, 313; and *Roggenkamp v. Roggenkamp*, 68 Fed. R. (C. C. A.) 605; s. c. 32 U. S. App. 453.

⁴ *Glenn v. Smith*, 2 Gill & J. 493, 513; *Sewall, J.*, in *Weeks v. Gibbs*, 9 Mass. 74, 77; *Olmsted v. Clark*, 30 Conn. 108.

⁵ Wms. [267], citing *Dyer*, 156 *b*, margin; 1 Saund. 265, note 2, to *Osborne v.*

Rogers; *Hooper v. Summersett*, Wightw. 21, *per curiam*; *Yardley v. Arnold*, Carr. & M. 434; *Truett v. Cummons*, 6 Ill. App. 73; *McKenzie v. Pendleton*, 1 Bush, 164.

⁶ *Oxenham v. Clapp*, 2 B. & Ad. 309.

⁷ Wms. [267], and authorities. But the appointment of an administrator since the institution of the suit, without averment that the assets have been delivered, is no defence: *McMeekin v. Hynes*, 80 Ky. 343.

⁸ *National Bank v. Lewis*, 12 Utah, 84, 96, 102. But he cannot have a separate trial of each of the pleas of *non assumpsit*, *ne unques executor*, and that he never intermeddled: *Brodnax v. Brown*, Dudley, (Ga.) 202, citing English authorities on pleading.

⁹ *Brown v. Leavitt*, 26 N. H. 493, 497.

¹⁰ *Goff v. Cook*, 73 Ind. 351; *Kahn v. Tinder*, 77 Ind. 147.

States, fixed by statute, and is generally limited by the value of the goods intermeddled with;¹ in Indiana,² Georgia,³ and North Carolina,⁴ a penalty is superadded, and in New Hampshire it is double the value of the property intermeddled with.⁵ It is self-evident that, if he undertake

Liability of executor *de son tort* fixed by statute.

to show the application of the assets of the deceased to the payment of his debts, he will not be protected unless the payment was made under circumstances which would protect a rightful administrator;⁶

hence, if he has paid more than the just dividend to one or [* 424] more creditors, he will be liable to others, in * excess of the amount of assets received, in such amount as may be necessary to make up their just proportion.⁷

§ 195. **Liability to the Rightful Executor or Administrator.** —

The liability of an executor *de son tort* at the suit of a rightful executor or administrator⁸ is necessarily different from that to a creditor, for this among perhaps other reasons, that the intermeddling with the assets of an estate under legal administration involves an element of wrong not included in the intermeddling when there is no lawful representative; viz. the infringement of the rights of the executor or administrator.⁹ Hence to an action by the

rightful executor or administrator the executor *de son tort* cannot plead in bar the payment of debts, etc., to the value of the assets, or that he has given the goods in satisfaction of the debts;¹⁰ and although under a plea of the general issue, in an action of trespass or trover by a rightful executor or administrator, the payments proved to have been made by the executor *de son tort* amount to the full value of the goods, yet there must be judgment for at least nominal damages.¹¹ He may prove, however, under the general issue,

Executor *de son tort* cannot plead, *plene administravit*, etc., to an action by the rightful executor or administrator;

¹ Hill v. Henderson, 13 Sm. & M. 688; Leach v. House, 1 Bai. 42, 43; McKenzie v. Pendleton, 1 Bush, 164; Cook v. Sanders, 15 Rich. 63; Kinard v. Young, 2 Rich. Eq. 247; Elder v. Littler, 15 Iowa, 65; Glenn v. Smith, 2 Gill & J. 493, 513; Winfrey v. Clarke, 107 Ala. 355.

² Wilson v. Davis, 37 Ind. 141, 145 (adding ten per centum to the value of the property converted).

³ Per McCay, J., in Alfriend v. Daniel, 48 Ga. 154, 156.

⁴ But the provision does not apply to every one who may be executor *de son tort*: Currie v. Currie, 90 N. C. 553.

⁵ Bellows v. Goodall, 32 N. H. 97; Gen. L. 1881, ch. 195, § 15.

⁶ See cases *infra*, § 195, as to the liability of an executor *de son tort* in a suit by the rightful administrator.

⁷ Gay v. Lemle, 32 Miss. 309, 312; Bennett v. Ives, 30 Conn. 329, 335.

⁸ *Ante*, § 193.

⁹ In the American States executors and administrators are generally allowed a compensation in the shape of commissions on the amount of property administered, the deprivation of which may constitute an element of wrong to them.

¹⁰ Wms. [270], and English authorities there cited; Buchanan, C. J., in Glenn v. Smith, 2 Gill & J. 493, 513.

¹¹ Anon., 12 Mod. 441; Lord Ellenborough, in Mountford v. Gibson, 4 East, 441, 447; Woolley v. Clark, 5 B. & Ald. 744, 746, of which case Mr. Williams says that it holds that the defendant was not entitled to show that he had administered the assets, but doubts whether it is to be understood as overruling the cases allow-

but may prove in mitigation of damages, payments made by him in the
 payments of debts in miti- rightful course of administration, because it is no detri-
 gation of damages. ment to the administrator *de jure* that such payments
 were made by the executor *de son tort*.¹ But, without
 statutory authority to such effect, he cannot in an action of trover
 give in evidence payment of debts to the value of goods still
 in his possession, but only such as were *sold;² and such [*425]
 recoupment is only allowed if the assets are sufficient to pay
 all the debts of the deceased, because otherwise the rightful admin-
 istrator would be precluded from giving preference to one creditor
 over another, which is his privilege at common law, and from retaining
 for his own debt in priority to other creditors of equal degree;³ and
 where neither the right to prefer nor that of retainer exists, as in
 most of the American States, he would be prevented from paying all
 of the creditors their just dividends.⁴ And he cannot, *a fortiori*, be
 allowed for debts voluntarily paid in a State where such voluntary
 payment is not a proper credit in favor of a rightful executor or
 administrator.⁵

An executor *de son tort* who has used the assets of an estate in
 the payment of debts, and for the use and benefit of those who
 would have been entitled to it in due course of administration, will
 be protected in equity against the suit of an administrator appointed
 subsequently, because the appointment of an administrator under
 such circumstances is a useless and expensive ceremony.⁶

§ 196. **Effect of the Appointment of an Executor de son Tort upon his Previous Tortious Acts.** — It has already been mentioned, that the grant of letters to an executor or administrator relates back, so as to legalize all previous acts within the authority and scope of a rightful representative.⁷ This doctrine is obviously applicable to the acts of executors *de son tort* who may subsequently obtain a grant

ing the defendant to recoup payments in due course of administration in mitigation of damages.

¹ Chapman, C. J., in *Carey v. Guillow*, 105 Mass. 18, 21, citing *Whitehall v. Squire, Carth.* 103, 104; *Mountford v. Gibson, supra*; *Icely v. Grew*, 6 Nev. & Man. 467, 469 note (a); see also *Saam v. Saam*, 4 Watts, 432; *Reagan v. Long*, 21 Ind. 264, 265; *Tobey v. Miller*, 54 Me. 480, 482; *Dorsett v. Frith*, 25 Ga. 537, 542 (otherwise under the Code: *Barron v. Burney*, 38 Ga. 264, 268); *McConnell v. McConnell*, 94 Ill. 295, 298; *Hostler v. Scull*, 2 Hayw. 179.

² *Hardy v. Thomas*, 23 Miss. 544, 546, citing *Buller's Nisi Prius*, 48; *Lomax, Ex.* 363, 364.

³ *Wms. Ex.* [271], citing English authorities.

⁴ *Neal v. Baker*, 2 N. H. 477, 478; *Tobey v. Miller*, 54 Me. 480, 483; *Collier v. Jones*, 86 Ind. 342.

⁵ *Bryant v. Helton*, 66 Ga. 477; but the retention of the property for the support of the widow and family is a good defence: *Barron v. Burney*, 38 Ga. 264, 268; *Crispin v. Winkleman*, 57 Iowa, 523, 526.

⁶ *Brown v. Walter*, 58 Ala. 310, 313, citing *Vanderveer v. Alston*, 16 Ala. 494, which contains a review of the history of administration at common law and under English and Alabama statutes, by Chilton, J.

⁷ *Ante*, §§ 173, 184.

of letters; for the executor who was not qualified to act, and the person who had not been appointed administrator, were equally executors *de son tort* if they intermeddled. The intermediate acts, which were tortious or unlawful for the want of competent authority before appointment, become, by relation, lawful acts of administration, for which the actor must account; the liability to account involves a [* 426] validity in his acts which is a protection to *those who have dealt with him.¹ So if, *pendente lite*, an executor *de son tort* obtains administration, he may retain for his own debt;² and to *scire facias* on a judgment against him, or to an action in assumpsit, plead in bar that he has taken out letters, and that the estate is insolvent.³ The sale of property or payment of a legacy by an executor *de son tort* becomes valid upon probate of the will, or subsequent grant of administration,⁴ and is binding upon the lawful representative.⁵

Grant of letters to an executor *de son tort* validates his previous acts.

It is, however, to be observed that only such acts of the executor *de son tort* are legalized and made valid by the subsequent appointment as would have been valid had he been the rightful administrator;⁶ and also that the rights of innocent parties intervening must not be affected by the application of the doctrine of relation.⁷

Except such as are invalid in a rightful executor.

There will be occasion to show, hereafter, that one who has made himself liable as an executor *de son tort* is not, for that reason, disqualified to be appointed administrator of the estate.

§ 197. **Validity of the Title acquired by an Alienee from an Executor de son Tort.** — It would seem to result from the doctrine holding the lawful acts of an executor *de son tort* to be good,⁸ that the alienation of goods by him for the payment of debts is good and indefeasible.⁹ Mr. Williams gives as authority the statement of Lord Holt,¹⁰ that a legal act done by an executor *de son tort* shall bind the

The *bona fide* alienee of an executor *de son tort* takes a good title at common law.

¹ *Per* Colt, J., in *Hatch v. Proctor*, 102 Mass. 351, 354; *Magner v. Ryan*, 19 Mo. 196, 200; *Priest v. Watkins*, 2 Hill (N. Y.), 225; *Clements v. Swain*, 2 N. H. 475, 476, and authorities; *Emery v. Berry*, 28 N. H. 473, 484; *McClure v. People*, 19 Ill. App. 105; *Rainwater v. Harris*, 51 Ark. 401.

² *Wms.* [269], citing *Pyne v. Woolland*, 2 Ventr. 179, 180; *Williamson v. Norwiche*, Sty. 337; *Vaughan v. Browne*, 2 Stra. 1106.

³ *Shillaber v. Wyman*, 15 Mass. 322; *Olmsted v. Clark*, 30 Conn. 108; *Andrew v. Gallison*, 15 Mass. 325, note.

⁴ *Wilson v. Wilson*, 54 Mo. 213, 216; *Pinkham v. Grant*, 78 Me. 158.

⁵ *Vroom v. Van Horne*, 10 Pa. 549, 558, citing, as establishing the same prin-

ciple, *Whitehall v. Squire*, Holt, 45; *Witt v. Elmore*, 2 Bail. L. R. 595; *Walker v. May*, 2 Hill, Ch. 22; *Filhour v. Gibson*, 4 Ired. Eq. 455, 460; *Alvord v. Marsh*, 12 Allen, 603, 604.

⁶ *Ante*, § 187.

⁷ *Napton, J.*, in *Wilson v. Wilson*, 54 Mo. 213, 216.

⁸ As announced in *Coulter's Case*, 5 Co. 30 b, and authorities *ante*, §§ 94, 95.

⁹ *Graysbrook v. Fox*, Plowd. 275, 282. Otherwise where the purchaser is not a creditor of the estate, or does not take the property in discharge of a debt due him by decedent: *Rockwell v. Young*, 60 Md. 563.

¹⁰ In *Parker v. Kett*, 1 Ld. Raym. 661. s. c. 12 Mod. 471.

rightful executor and alter the property.¹ This statement is open *to the objection that it does not define what constitutes a "good" or "legal" act by an executor *de son tort*.

Mr. Williams proceeds to show that only such acts are understood to be valid, as against the true representative, which the true representative himself would have been bound to perform in the course of due administration;² and that it must have been done by one proved to have been acting at the time in the character of executor, — not a mere solitary act of wrong, in the very instance complained of, by one taking upon himself to hand over the goods of the deceased to a creditor.³ This principle implies that payment of a debt to an executor *de son tort*, not acting in the character of one administering the estate, is no protection against a demand for the same by the lawful representative.⁴

It may be remarked in this connection that, although an executor *de son tort* is protected in what he does in good faith in the course of the lawful administration of an estate so far as he has assets, yet he acquires no demand against the administrator *de jure* for any disbursement by him in excess of the assets.⁵

§ 198. **Application of the Doctrine in America.** — Distinguished American writers on this subject have expressed their disapprobation of the doctrine of liability as executor *de son tort* in strong terms, and intimate that it meets with little *favor in American courts.⁶ There can [* 428] be no doubt that in many of the American States,

¹ The reason given is, that creditors are not bound to seek further than him who acts as executor. Mr. Williams also cites the judgment of Le Blanc, J., in *Mountford v. Gibson*, 4 East, 441, 454, and of Littledale, J., in *Oxenham v. Clapp*, 1 B. & Ad. 313.

² *Buckley v. Barber*, 6 Exch. 164, 183. Acts which would be invalid if done by a lawful executor, cannot be valid when done by an executor *de son tort*: *Rockwell v. Young*, 60 Md. 563, 568.

³ *Wms.* [272]; *Gilchrist, J.*, in *Pickering v. Coleman*, 12 N. H. 148, 151, holding that in such case the rightful administrator may maintain trover against the vendee; *Carpenter v. Going*, 20 Ala. 587, 590, holding that in an action of trover by the rightful administrator the vendee cannot prove in mitigation that the purchase-money was used in the payment of debts; *Morton v. Preston*, 18 Mich. 60, 71, holding that in an action of trover by the executrix *de son tort*, after she has

taken letters of administration, she is not estopped by her previous act, and relying on the previous case of *Cullen v. O'Hara*, 4 Mich. 132; *Woolfork v. Sullivan*, 23 Ala. 548, 555, holding that the vendee of an executrix *de son tort* takes all that she has, — the possession, — and that he can maintain it against all the world except the rightful administrator in a suit; *Wilson v. Hudson*, 4 Harr. 168, denying that the subsequent appointment of the executrix *de son tort* as administratrix gave any validity to her former act: *Mitchell v. Kirk*, 3 Sneed, 319, in which an administratrix recovered from a creditor whom she herself had paid before appointment.

⁴ *Lee v. Chase*, 58 Me. 432, 435, citing *Hunter v. Wallace*, 13 Up. Can. Q. B. 385; *Bartlett v. Hyde*, 3 Mo. 490.

⁵ *De La Guerra v. Packard*, 17 Cal. 182, 192.

⁶ 3 Redf. on Wills, 21, note (6); Schouler Ex., §§ 184, 187; Horner, Pr. L., § 115; ante, § 188.

in which the common-law system of the administration of the estates of deceased persons has been entirely done away with, this doctrine should disappear with the conditions which called it into being. There is neither occasion nor room for it in those States which have vested complete jurisdiction in probate courts to control the settlement of estates of deceased persons: where the title to the personal property remains in abeyance until an executor or administrator is appointed by the court, and any other person undertaking to interfere with it is known to be without lawful authority to do so; where creditors of the deceased cannot be lawfully satisfied out of the property of the estate until they have proved their claims in the manner pointed out by the law; and where an executor or an administrator can neither prefer a creditor nor retain for his own debt. It is quite apparent that in such States it would be irrational to apply the doctrine of executor *de son tort* to one who unlawfully appropriates the property left by a deceased person, and thereby renders himself liable as a wrongdoer to the one upon whom the law casts the title: which, by relation, attaches to him from the time of the decedent's death. No one's interest would be subserved: neither that of the creditor, — for he has a safer, simpler, and less expensive remedy against a lawful administrator, and cannot pretend that he looked upon the intermeddler as rightfully in possession; nor that of the heir or distributee, — whose safety is better secured by the appointment of a competent officer of the court, whose duty it will be to recover all the property belonging to the estate and dispose of it according to law; nor yet that of the intermeddler himself, whose wrongful act, instead of subjecting him to intricate complications, the result of which it is impossible to foresee, will simply lead to the punishment or reparation demanded by the law.

The office of executor *de son tort* is accordingly abolished in New York,¹ and declared by the courts of Arkansas,² California,³ [* 429] * Kansas,⁴ Missouri,⁵ Ohio,⁶ Oregon,⁷ and Texas,⁸ to be repugnant to the letter and spirit of the law of these States.⁹ In other States, whose adminis-

And it is abolished in some of the States.

¹ Rev. St. p. 449, § 17. Alluded to in *Field v. Gibson*, 20 Hun, 274, 276.

² *Barasien v. Odum*, 17 Ark. 122, 127; *Rust v. Witherington*, 17 Ark. 129.

³ *Bowden v. Pierce*, 73 Cal. 459, 463, affirmed in 15 Pac. R. 64. The authorities relied on seem, however, to contain mere *dicta*. See *Valencia v. Bernal*, 26 Cal. 328, 335; *Estate of Hamilton*, 34 Cal. 464, 468; *Pryor v. Downey*, 50 Cal. 388, 400.

⁴ *Fox v. Van Norman*, 11 Kans. 214, 217.

⁵ *Rozelle v. Harmon*, 29 Mo. App. 569,

578, affirmed in 103 Mo. 339. See also *Richardson v. Dreyfuss*, 64 Mo. App. 600.

⁶ *Benjamin v. Le Baron*, 15 Oh. 517; *Dixon v. Cassell*, 5 Oh. 533.

⁷ *Rutherford v. Thompson*, 14 Oreg. 236, 239.

⁸ *Ansley v. Baker*, 14 Tex. 607, 610; *Green v. Rugely*, 23 Tex. 539.

⁹ *Hanley, J.*, in *Barasien v. Odum*, *supra*, thus quotes from *Walker v. Byers*, 14 Ark. 246, 252, as indicating the scope of probate jurisdiction: "The probate court is intrusted with the custody of es-

tration laws present the same or similar features as those above mentioned, neither the legislature nor courts have abolished the doctrine, at least not in express terms;¹ but it is gradually passing out of notice, for the reason that it meets no practical want.²

In those States, however, in which the common-law mode of administration is still more or less adhered to, — where, for instance, But still recognized in others. the executor has power to act before qualifying, and even before probate of the will, where he may pay debts not proved before a court or without order of the court, where he is not required to give bond, etc., — the doctrine of executor *de son tort* is a natural and essential element of their law. The objection urged against it by American writers, that it subjects all of the assets in the hands of a wrongdoer to the satisfaction of the claim of the creditor suing, and thus, to that extent, defeats the just and equal distribution, is equally valid against the executor or administrator *de jure*, under the common law, who, by their preference, or liability to pay the creditors in the order in which they bring their actions, likewise defeat a “just and equal distribution” between them.

In Louisiana the common-law doctrine of executor *de son tort* is not in force; but by statute one intermeddling with the estate of a deceased person without lawful authority is liable to both criminal and civil actions; but there is no civil liability until there has been conviction in a criminal prosecution.³

tates; and that tribunal proceeds, *in rem*, to adjust the rights of all persons interested in an estate, and disposes of it in accordance with the provisions of the statute; having for these purposes the most summary and plenary powers, within the scope of its jurisdiction, conferred by the constitution and statutes, administering both law and equity within this scope, ac-

cording to the exigency of the rights to be adjudicated upon.”

¹ The States in which the doctrine is recognized as still existing are mentioned *ante*, § 188.

² See remarks of Philips, J., in *Rozelle v. Harmon*, 29 Mo. App. 569, 578.

³ *Walworth v. Ballard*, 12 La. An. 245; *Carl v. Poelman*, 12 La. An. 344.

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* CHAPTER XXII.

OF THE NECESSITY OF OFFICIAL ADMINISTRATION.

§ 199. **Why Administration is necessary.** — The necessity of official administration, that is to say, of obtaining a grant of letters testamentary or of administration, as the case may be, and the judicial sanction of payment of debts and legacies out of the estate and the distribution of the residue, arises out of the common-law doctrine that the personal property of a decedent descends to the executor or administrator, while his real estate descends to the devisees or heirs, subject, under English and American statutes, to the payment of his debts and legacies. This doctrine is recognized substantially in all the States, except Louisiana, where, under circumstances pointed out by law, the title to personal as well as real property descends directly to the natural or instituted heirs. The direct consequence of this principle of the law is, that without due course of administration the claims of creditors cannot be lawfully satisfied, and neither heirs nor legatees can obtain a legal title to their legacies or distributive shares; and that neither devisees nor heirs can hold the real estate to which they succeed free from the claims of creditors of the deceased, against whom limitation does not, in some States, run after the debtor's death, until there be lawful administration of his estate.¹ Another consequence is, that the payment of debts to the deceased can be coerced by no one but the lawfully appointed executor or administrator, even in equity, because there is no privity between the debtors and any person other than the legal representative.² He stands as the representative of those interested in the devolution of the personalty of the deceased, including creditors of the

Necessity of administration arises out of the vesting of personal estate in the executor, and the liability of real estate for debts.

Administrator represents those to whom the estate devolves.

¹ *Post*, § 401. Even where the Statute of Limitations is recognized as barring ordinary debts, "there may be debts existing against him which do not fall within the bar of the Statute of Limitations, — defaults as executor, or as administrator, or in some other fiduciary capacity, or debts payable on a contingency, the contingency not happening on which they are payable until a very recent period. He had the capacity to incur such debts, and it cannot

be affirmed with certainty that they do not exist": Brickell, C. J., in *Costephens v. Dean*, 69 Ala. 385, 389. See further *post*, § 202, p. * 434, note.

² "The general rule in a court of equity is, that neither creditors, nor distributees, nor legatees, can maintain a bill against debtors of an estate, to subject debts they may owe to the satisfaction of their demands": *Dugger v. Tayloe*, 60 Ala. 504, 517.

estate as well as legatees and distributees;¹ and in the absence of fraud his actions within the sphere of his duties are conclusive and binding upon them.² The peculiar status of the executor *de son tort*

* which at common law follows the intermeddling with the [* 431] estate of a deceased person by one not clothed with official authority for that purpose, and which has been considered in a preceding chapter,³ is also a consequence of the devolution of title to personal property upon the executor or administrator, excluding, until administration be had, even the distributee, legatee, and creditor, and forcing upon the intermeddler, in protection of the interest of creditors and distributees, the character of a *quasi* executor, liable as such to those who have any claims against the estate.

§ 200. **Cases holding Administration necessary.** — The question whether administration is indispensable or not is of frequent occurrence, and the decisions arising thereunder are very numerous. In a

It is unsafe to pay debts or distribute residuum without grant of letters.

States holding that neither heirs nor legatees can sue any one but the executor or administrator.

practical point of view it is never safe, except in those cases which will be noticed further on,⁴ to pay the debts of a deceased person and distribute the residuum among those entitled under the law, without complying with the statute demanding the appointment of an executor

or administrator, and obtaining the judgment of the probate court upon the questions arising in the course of administration. It is held in various cases, respectively, that neither heirs nor legatees can sue any person in respect of the assets of an estate but the executor or administrator, nor legally distribute the estate among themselves, and that payment of a debt due the deceased to any one

but a legally constituted executor or administrator will not protect the debtor against the demand of such representative, in Alabama,⁵ Arkansas,⁶ California,⁷ Colorado,⁸ Connecticut,⁹ Georgia,¹⁰ Kan-

¹ *Morris v. Murphy*, 95 Ga. 307; *per Hackney, Ch. J.*, in *Harter v. Sanger*, 138 Ind. 161; see, also, *Glover v. Patten*, 165 U. S. 394, 402; *Cowen v. Means*, 47 U. S. App. 439; s. c. 78 Fed. 536.

² *Morris v. Murphy*, 95 Ga. 307 (hold-

³ *Ante*, ch. xxi.

⁴ *Post*, § 201.

⁵ The decisions in this State are very numerous on this point: see *Costephens v. Dean*, 69 Ala. 385, in which some of them are cited.

⁶ *Flash v. Gresham*, 36 Ark. 529, 531. Payment to the heirs is no defence to an action by the administrator: *McCustian v. Ramsey*, 33 Ark. 141, 147.

⁷ *Harwood v. Marye*, 8 Cal. 580 (holding that all property of decedents, both real

and personal, goes into the possession of the administrator conclusive against legatees and all other creditors): *Byrd v. Byrd*, 117 N. C. 523 (holding that the next of kin have no right to be made parties to a suit against the estate, though alleging

and personal, goes into the possession of the administrator). And see *Estate of Strong*, 119 Cal. 663.

⁸ *Hall v. Cowles*, 15 Colo. 393, 398.

⁹ *Taber v. Packwood*, 1 Day, 150; *Roorbach v. Lord*, 4 Conn. 347, 349.

¹⁰ *Scranton v. Demere*, 6 Ga. 92. But after an adverse possession for twenty years or more, administration will be presumed to protect an innocent purchaser: *Woodfolk v. Beatly*, 18 Ga. 520.

[* 432] sas,¹ Kentucky,² Illinois,³ Indiana,⁴ Iowa,⁵ * Maryland,⁶ Massachusetts,⁷ Mississippi,⁸ Missouri,⁹ Montana,¹⁰ Nebraska,¹¹ New Hampshire,¹² New York,¹³ North Carolina,¹⁴ Ohio,¹⁵ Rhode Island,¹⁶ South Carolina,¹⁷ Tennessee,¹⁸ Texas,¹⁹ Wisconsin,²⁰ and probably in other States.

§ 201. **Exceptions permitted in some States.**—The rights of creditors to the assets of a deceased person is the principal reason for

¹ *Cox v. Grubb*, 47 Kans. 435, holding a contract between a surviving partner, the widow of a deceased partner leaving minor children and individual creditors, for the distribution of the estate without administration to be void, as against public policy; *Presbury v. Pickett*, 1 Kans. App. 631, denying the right of a sole heir to sue on a note of small value on the ground that an administrator alone can sue.

² *McChord v. Fisher*, 13 B. Mon. 193, 195.

³ *Leamon v. McCubbin*, 82 Ill. 263. It is held in this State, that where all the debts of an estate have been paid, and the property divided among the heirs pursuant to a written agreement entered into by them, so that nothing remained for an administrator to do, the appointment of an administrator is unnecessary; and if one is appointed, the court will not require the property so divided to be delivered to him: *People v. Abbott*, 105 Ill. 588; but that such an agreement among the heirs is revocable by them or any of them before it is completely executed, and that the appointment of an administrator at the instance of one of them effected such revocation: *Patterson v. Patterson*, 74 Ill. App. 321.

⁴ *Carr v. Huetten*, 73 Ind. 378, citing *i. a.* *The Northwestern Conference v. Myers*, 36 Ind. 375, and *Leonard v. Blair*, 59 Ind. 510; *Bowen v. Stewart*, 108 Ind. 507, 516.

⁵ *Haynes v. Harris*, 33 Iowa, 516; followed in *Baird v. Brooks*, 65 Iowa, 40, which announces the rule that no action can be maintained by the heirs on a promissory note, so long as the time fixed by

statute within which letters may be granted has not expired.

⁶ *Hogthorp v. Hook*, 1 Gill & J. 270, 294.

⁷ *Pritchard v. Norwood*, 155 Mass. 539; *Lawrence v. Wright*, 23 Pick. 128, 130; *Hall v. Burgess*, 5 Gray, 12, 16.

⁸ *Marshall v. King*, 24 Miss. 85, 91, citing *Browning v. Watkins*, 10 Sm. & M. 482, 485.

⁹ *Craslin v. Baker*, 8 Mo. 437; *Green v. Tittman*, 124 Mo. 372; *Hastings v. Meyers*, 21 Mo. 519; *Bartlett v. Hyde*, 3 Mo. 490; *State v. Moore*, 18 Mo. App. 406; *McMillan v. Wacker*, 57 Mo. App. 220; *Adey v. Adey*, 58 Mo. App. 408; *Jacobs v. Maloney*, 64 Mo. App. 270.

¹⁰ *Higgins' Estate*, 15 Mont. 474.

¹¹ *Cox v. Yeazel*, 49 Neb. 343.

¹² *Tappan v. Tappan*, 30 N. H. 50, 68.

¹³ *Beecher v. Crouse*, 19 Wend. 306.

¹⁴ *Whit v. Ray*, 4 Ired. L. 14; *Davidson v. Potts*, 7 Ired. Eq. 272.

¹⁵ *Chappelear v. Martin*, 45 Oh. St. 126.

¹⁶ *Allen v. Simons*, 1 Curt. 122.

¹⁷ *Bradford v. Felder*, 2 McCord, Ch. 168, 169.

¹⁸ *Smiley v. Bell*, Mart. & Y. 378.

¹⁹ *Alexander v. Barfield*, 6 Tex. 400, 404. Pending an administration heirs cannot sue, save where it is shown to be necessary for their protection: *Lee v. Turner*, 71 Tex. 264; *Richardson v. Vaughn*, 86 Tex. 93. But a grant of administration after a great lapse of time should be regarded as a nullity, unless special reasons existed therefor: *Cochran v. Thompson*, 18 Tex. 652, 655.

²⁰ *Murphy v. Hanrahan*, 50 Wis. 485, 490.

collusion between the administrator and creditor). As to the conclusiveness of claims allowed against the estate, see *post*, § 392; and in some States the administrator or executor also represents the owners of the real estate, and his actions are con-

clusive even on heirs or devisees: see on this subject, *post*, § 337; but usually judgments against the personal representative are not binding on the persons to whom the real estate descends, because he does not represent them: *post*, § 466.

requiring official administration, and courts, therefore, sanction the disposition of the property of a decedent without the appointment of an administrator where it is certain that no debts are owing. Thus, upon the death of an infant intestate, administration is held unnecessary, because an infant is presumed not to have incurred any liability;¹ but not so in the case of the death of a married woman;² or adjudged lunatic;³ and the presumption that an infant has incurred no liability is rebutted where he was married and leaves a widow,⁴ or may be rebutted by proof of existing liabilities;⁵ and in such case administration is necessary, notwithstanding the statutory prohibition of administration on the estates of deceased minors who were under guardianship.

There is a series of decisions in Alabama, asserting that, when an estate is entirely free from debt, the distributees may in equity obtain distribution without the delay and expense of administration;⁶

from which Brickell, C. J., deduces this rule:
 * "A court of equity will dispense with an [*433] administration, and decree distribution directly, when it affirmatively appears that, if there was an administrator, the only duty devolving on him would be distribution. Then administration is regarded as 'a useless ceremony.'"⁷ Most of these cases expressly emphasize that they constitute exceptions to the general rule, and rest upon analogy with the doctrine that equity will interpose where there is collusion between the debtors and the personal representative; or where he is insolvent and there is just apprehension of loss if he is permitted to collect the debts, or, as was said by Chancellor Kent,⁸ "where there is some other special case not exactly defined,"⁹ and courts of equity refuse their aid, unless the case very clearly shows that an administrator would be superfluous.¹⁰ The same doctrine,

¹ *Cobb v. Brown*, Speers Eq. 564, 566; *Bethea v. McColl*, 5 Ala. 308, 315; *Vanzant v. Morris*, 25 Ala. 285, 295; *Lynch v. Rotan*, 39 Ill. 14; *McCleary v. Menke*, 109 Ill. 294. See *Woerner on Guardianship*, § 100.

² *Cobb v. Brown*, *supra*; *Patterson v. High*, 8 Ired. Eq. 52.

³ *Woerner on Guardianship*, § 150.

⁴ *Norton v. Thompson*, 68 Mo. 143, 146.

⁵ *George v. Dawson*, 18 Mo. 407; *Alford v. Halbert*, 74 Tex. 346, 354. In Kansas administration may be granted on a minor's estate: *Wheeler v. St. J. Railroad*, 31 Kans. 640; *City v. Trompeter*, 53 Kans. 150. An action for money due a deceased infant can only be brought by an

administrator, not by the former guardian: *Barrett v. Provincher*, 39 Neb. 773.

⁶ *Trawick v. Davis*, 85 Ala. 342; *Fretwell v. McLemore*, 52 Ala. 124, 131, citing earlier Alabama cases.

⁷ *Fretwell v. McLemore*, *supra*, quoting the last phrase from the earlier Alabama cases cited.

⁸ In *Long v. Magestre*, 1 John. Ch. 305.

⁹ See *Brickell, C. J.*, in *Costephens v. Dean*, 69 Ala. 385, 388, quoting from *Dugger v. Tayloe*, 60 Ala. 504.

¹⁰ *Marshall v. Gayle*, 58 Ala. 284; *Hopkins v. Miller*, 92 Ala. 513 (holding an averment that the plaintiffs were the decedent's sole heirs at law insufficient, because not negating the existence of other distributees; and cases cited under § 200).

holding administration unnecessary when there are no debts of the estate, but only distribution to be made to those entitled, and for the same reason, is applied in other States; for instance, in Arkansas,¹ Georgia,² Indiana,³ Illinois,⁴ Kansas,⁵ Louisiana,⁶ Michigan,⁷ Minnesota,⁸ Mississippi,⁹ Missouri,¹⁰ Nebraska,¹¹ Nevada,¹² New [* 434] Hampshire,¹³ * Pennsylvania,¹⁴ Tennessee,¹⁵ Texas,¹⁶ Vermont,¹⁷

¹ *Sanders v. Moore*, 52 Ark. 376, allowing the heir to sue.

² Where distribution between adult heirs or legatees is held good, at least in equity, as among themselves and against strangers, but cannot affect the rights of creditors: *Amis v. Cameron*, 55 Ga. 449, 451, citing earlier Georgia cases.

³ *Robertson v. Robertson*, 120 Ind. 333, 337; *Finnegan v. Finnegan*, 125 Ind. 262; *Begien v. Freeman*, 75 Ind. 398; *Holzman v. Hibben*, 100 Ind. 338; *Salter v. Salter*, 98 Ind. 522, all holding that, as an exception to the general rule, the heirs may sue for a debt owing to the decedent, if he left no debts to be paid and there is no administration, and citing earlier Indiana cases.

⁴ *McCleary v. Menke*, 109 Ill. 294.

⁵ *McLean v. Webster*, 45 Kans. 644, allowing the creditor of a decedent, without taking out administration, to subject real estate in the possession of the heir to the satisfaction of the creditor's debt, there being no other debts against the estate. But see *Presbury v. Pickett*, 1 Kans. App. 631, denying the right of a sole heir of an intestate without debts to maintain suit on a note due decedent.

⁶ *Succession of Welch*, 36 La. An. 702; *post*, § 203.

⁷ Adult heirs having agreed upon the settlement of an estate, there being no debts, are estopped from disturbing it by the appointment of an administrator: *Needham v. Gillett*, 39 Mich. 574; *Foote v. Foote*, 61 Mich. 181.

⁸ A *bona fide* payment of a debt due an estate made to a sole distributee, there being no creditors whose rights are affected, will operate to discharge the debtor from liability to a subsequently appointed administrator: *Vail v. Anderson*, 61 Minn. 552.

⁹ Voluntary distribution between heirs capable of binding themselves is valid; but not if parties are interested who are incapable of assenting to the distribution

in a binding manner: *Kilcrease v. Shelby*, 23 Miss. 161, 166. It is well settled in Mississippi that, in the absence of administration of the estate of a decedent, a court of chancery will decree distribution among the heirs: *Watson v. Byrd*, 53 Miss. 480, 483, citing earlier Mississippi cases; *Ricks v. Hilliard*, 45 Miss. 359, 363.

¹⁰ The Kansas City Court of Appeals so held in *McCracken v. Caslin*, 50 Mo. App. 85. This decision is not in accordance with the other Missouri cases. See *ante*, § 200.

¹¹ *Dictum* in *Cox v. Yeazel*, 49 Neb. 343.

¹² *Wright v. Smith*, 19 Nev. 143, 147.

¹³ Equity will not interfere with the voluntary settlement of an estate by adult heirs, except for manifest mistake, fraud, or misconduct of arbitrators, or other person concerned with the settlement: *George v. Johnson*, 45 N. H. 456, citing *Hibbard v. Kent*, 15 N. H. 516, 519; and it seems that the guardian may act for the ward so as to bind him: *Woodman v. Rowe*, 59 N. H. 453.

¹⁴ If there be no creditors, the heirs have a complete equity in the property, and they may distribute it among themselves without administration: *Walworth v. Abel*, 52 Pa. St. 370, 372; *Weaver v. Roth*, 105 Pa. St. 408, 413. Or, as against a mere intruder, they may maintain trespass, trover or account render: *Roberts v. Messenger*, 134 Pa. St. 298, 310.

¹⁵ *Hurt v. Fisher*, 96 Tenn. 570; *Christian v. Clark*, 10 Lea, 630, 638, citing *Brandon v. Mason*, 1 Lea, 615. But division of an intestate's property without administration is not encouraged: *Crabb, J.*, in *Wright v. Wright*, Mart. & Y. 43.

¹⁶ *Patterson v. Allen*, 50 Tex. 23, 25; *Webster v. Willis*, 56 Tex. 468; *Northcraft v. Oliver*, 74 Tex. 162.

¹⁷ *Taylor v. Phillips*, 30 Vt. 238; *Babbitt v. Bowen*, 32 Vt. 437.

Non-existence
of debts not
demonstrable.

and Washington.¹ It is, however, difficult to perceive how it can be determined as a matter of law that there are no debts which can be proved against a decedent's estate, before the period allowed for proving claims has expired.² The effect of a voluntary distribution among those entitled to the decedent's estate is considered in connection with the subject of distribution.³ So where by the statute administration cannot be granted after the lapse of a certain period of time, the title to the property of the decedent, which may have been in abeyance during such period, vests in the heirs, so that they may maintain an action thereon,⁴ or be sued.⁵ Nor will administration be held necessary to enable one to bring a suit to cancel a conveyance of real estate, or to vacate an unauthorized will.⁶ Where there is an administrator, and the heirs or parties beneficially entitled thereto are in possession of personal property, the administrator will not be allowed to recover if it appear that debts are all paid.⁷ In Connecticut the statute provides that, if all parties in interest are capable of acting, they may distribute the estate by deed recorded. If the deed is not executed and recorded as provided by statute, it is not sufficient to preclude a

Administra-
tion in small
estates.

regular distribution by the probate court.⁸ It will be shown further on, that in some States administration of estates of less than a certain value, or less than the amount allowed the widow or children absolutely, is dispensed with.⁹

§ 202. **Residuary Legatees and Widows taking Estates without Administration.** — In the States of Maine,¹⁰ Maryland,¹¹ Massachusetts,¹² Michigan,¹³ Minnesota,¹⁴ Nebraska,¹⁵ New Hampshire,¹⁶

¹ *Tucker v. Brown*, 9 Wash. 357.

² "From the nature of the case the proposition that there are no debts provable against the estate of a deceased person is, therefore, a negative proposition, which is not susceptible of absolute proof. No evidence which could be offered in support of such a proposition could go further than to reach a strong degree of probability." *Powell v. Palmer*, 45 Mo. App. 236: and see also the dissenting remarks of Bradley, J., in *Blood v. Kane*, 130 N. Y. 514, on p. 522; *Higgins' Estate*, 15 Mont. 474.

³ *Post*, § 566.

⁴ *Phinny v. Warren*, 52 Iowa, 332, 334; *Murphy v. Murphy*, 80 Iowa, 740.

⁵ *State v. Lewellyn*, 25 Tex. 797; *Patterson v. Allen*, 50 Tex. 23.

⁶ *Veal v. Fortson*, 57 Tex. 482, 487.

⁷ *Abbott v. The People*, 10 Ill. App. 62, 65, citing *Lewis v. Lyons*, 13 Ill. 117; *Woodhouse v. Phelps*, 51 Conn. 521; *Robinson v. Simmons*, 146 Mass. 167, 181.

But while a distributee may lawfully take and hold a promissory note belonging to the estate of an intestate, he can convey no title to the same to another, as against an administrator: *Pritchard v. Norwood*, 155 Mass. 539. So payment to one named as executrix who does not qualify, but distributes the assets as they would have gone had there been regular administration, is a defence to an action by an administrator subsequently appointed: *Langley v. Farmington*, 66 N. H. 431.

⁸ *Dickinson's Appeal*, 54 Conn. 224.

⁹ *Post*, § 202, p. *436.

¹⁰ *Rev. St.* 1883. p. 538, § 10.

¹¹ *Duvall v. Snowden*, 7 Gill & J. 430.

¹² *Pub. St.* 1882, ch. 129, §§ 6 *et seq.*; ch. 130, § 8.

¹³ *How. St.* 1882, § 5836.

¹⁴ *Gen. St. Min.* 1891, § 5673.

¹⁵ *Cons. St. Neb.* 1893, § 1224.

¹⁶ *Publ. St. N. H.* 1891, ch. 188, § 13.

Ohio,¹ Vermont,² Wisconsin,³ and Wyoming,⁴ it is provided that when the person nominated in the will as executor is also the residuary legatee, he may, at his option, instead of the regular administration bond required of executors, give bond with sufficient sureties conditioned that he will pay the testator's debts and legacies (including, either expressly or by implication, funeral expenses [* 435] and the allowances to * the widow and children), and will then be relieved from the necessity of returning an inventory, or further accounting in the probate court. An executor giving such bond at once becomes liable for all of the debts of the testator, but the liability of the estate is not extinguished;⁵ and it operates as an admission of sufficient assets and a guarantee to pay all debts, since the executor files no inventory of assets, the only means from which it could be ascertained whether they equal the debts and legacies.⁶ The bond cannot be surrendered or cancelled, at least not after the expiration of the time within which the law requires an inventory in ordinary cases to be filed;⁷ but if at any time afterward it be

States in which sole or residuary legatee may take the estate without administration on giving bond to pay debts.

Bond operates as admission of assets sufficient to pay all debts.

¹ Bates' An. St. 1897, § 5997.
² Vt. St. 1894, § 2375.
³ Ann. St. 1889, § 3795.
⁴ Rev. St. Wyoming, 1887, § 2239.
⁵ It was once held in Massachusetts (overruling the case of *Gore v. Brazier*, 3 Mass. 523, 540) that by the giving of such bond creditors lost their liens on the real or personal estate which the executor may have conveyed to *bona fide* purchasers: *Clarke v. Tufts*, 5 Pick. 337, 340, *Thompson v. Brown*, 16 Mass. 172, 178; but the lien of creditors on the testator's real estate is expressly preserved by Gen. St. 1860, p. 485. And it is so held under the statute of Michigan in *Lafferty v. People's Bank*, 76 Mich. 35, 46, 51. This case also holds that the bond is not a substitute for the estate of the deceased, but is cumulative, p. 49 (citing *Collins v. Collins*, 140 Mass. 502); that the residuary legatee cannot be sued personally (citing *Jenkins v. Wood*, 140 Mass. 66), and that in selling the decedent's real estate the act must be his official act, his individual deed conveying only his individual interest as devisee, without discharging the creditor's lien, p. 59. From this decision Judges Campbell and Sherwood dissent. So in Kansas it is said that "the authorities strongly sustain the view that an action on the bond is not the only

remedy of creditors or legatees, and that the giving of such bond does not close the administration, nor wholly deprive the probate court of jurisdiction over the executor and the estate. . . . There may be some reason why an unliquidated claim or undetermined legacy should be presented to the probate court for allowance; but there is no necessity, nor any good purpose to be subserved by the allowance of the probate court of a definite and fixed legacy": *Kreamer v. Kreamer*, 52 Kans. 597, 599. It is held that suit upon such bond must be brought within the time limited for suits against executors and administrators: *Jenkins v. Wood*, 134 Mass. 115.

⁶ *Shaw, C. J.*, in *Jones v. Richardson*, 5 Met. (Mass.) 247, 249; *Conant v. Stratton*, 107 Mass. 474, 483, citing *Fay v. Taylor*, 2 Gray, 154, and other Massachusetts cases. See also *Colwell v. Alger*, 5 Gray, 67, holding that the giving of such bond is a conclusive admission of assets; *Duvall v. Snowden*, 7 Gill & J. 430; *Batchelder v. Russell*, 10 N. H. 39; *Tarbell v. Whiting*, 5 N. H. 63; *Buell v. Dickey*, 9 Neb. 285, 293. See also *Jenkins v. Wood*, 144 Mass. 238.

⁷ *Alger v. Colwell*, 2 Gray, 404; *Hatheway v. Weeks*, 34 Mich. 237, 245; *Probate Judge v. Abbott*, 50 Mich. 278, 284.

deemed insufficient the executor may be ordered to give additional bond, and removed for failure to comply with such order.¹ Where a widow gives such bond as executrix and residuary legatee, it is not avoided by her failure to inform the judge, as required by the statute, of her acceptance of the provisions of the will.² The court may hear evidence to determine whether a legacy be residuary, and, if it appears that there is no other property undisposed of, a bond may be given to pay debts and legacies.³ And in Wisconsin it is held that the mere ordering, receiving, and approving of the bond does not vest the title in the executor unless the court judicially determine, upon due notice and opportunity for hearing those interested, that the executor is residuary legatee; and the notice of the probate of the will is not such notice as is required.⁴ Such residuary legatee

Sale of real
estate.

can sell the realty without an order of the probate court.⁵ In Alabama a sole legatee who is named executor in the will, but who fails to qualify as such, cannot maintain an action as the real person in interest to recover on a note in favor of the decedent, when it does not affirmatively appear that there are no debts.⁶

* It is to be observed that the simple designation in the [* 436] will of a person as residuary legatee and executor does not authorize him to collect demands of his testator; an appointment as executor by the probate court is necessary.⁷

In Texas the statute provides that a testator may provide in his will that "no other action shall be had in the county court, in relation to the settlement of his estate, than the probating and recording of his will, and the return of an inventory and appraisement and list of claims of his estate;"⁸ and if the will does not dispose of the whole estate, the executor may account in the county court, and pray for distribution, as in other cases.⁹ It is there held, that if the will provides for distribution or partition, the county court has no jurisdiction to adjudicate thereon.¹⁰ So by the statutes of Washington it is provided that if a testator provide the manner in which the estate shall be settled, and that no letters shall be required, such

Statutes per-
mitting letters
dispensed with
by testamen-
tary provi-
sion, etc.

¹ And after the removal no judgment can be rendered against him in an action previously brought against him in his representative character on a debt of the testator: *National Bank v. Stanton*, 116 Mass. 435.

² *Heydock v. Duncan*, 43 N. H. 95, 101.

³ *Morgan v. Dodge*, 44 N. H. 255, 263. In this case Bell, C. J., strongly discourages the giving of such bonds, "as many persons have been ruined" thereby: p. 262.

⁴ *Jones v. Roberts*, 84 Wis. 465.

⁵ *Lafferty v. People's Bank*, 76 Mich. 35, 48. In Wisconsin it is left an open question whether the statutory residuary "legatee" may be held to include "devisee": *Jones v. Roberts*, *supra*.

⁶ *Wood v. Cosby*, 76 Ala. 557.

⁷ *Tappan v. Tappan*, 30 N. H. 50; *Lafferty v. People's Bank*, 76 Mich. 35, 49.

⁸ *Sayles' Tex. Civ. St.* 1897, art. 1995.

⁹ *Ib.*, art. 2001.

¹⁰ *Lumpkin v. Smith*, 62 Tex. 249.

estate may be settled without the intervention of the court, in accordance with such will.¹ A similar provision exists in Arizona.² In Georgia the statute permits the widow, when she is sole heir, upon payment of her intestate husband's debts, to take possession of his estate without administration, and sue for and recover the same,³ while in Maryland it is provided that on the death of a married woman intestate, leaving a husband but no descendants, he is entitled to the personalty without administration unless she is liable for debts owing by her, but the title is suspended until the probate court orders that it shall pass.⁴

Provision is made by statute in some of the States that, where the property of an estate does not exceed in value the amount which is secured to the widow or minor orphans for their immediate support, the probate court may dispense with administration, and authorize the widow, or minor children by next friend, to collect and appropriate to their own use all such property.⁵ The soundness of the principle upon which such provisions rest, or rather the absurdity of a contrary view, is self-evident. Why should the law compel administration where there is nothing to administer? The appointment of an administrator in such case could have no possible effect but to diminish or eat up what the law intends for the support of widows and orphans. It is held in Louisiana, that administration is not necessary if the property of an estate is of less value than the expense of administration.⁶ And in Maine administration cannot be had on the estate of an intestate whose estate is not worth at least twenty dollars, or owing debts of that amount and having realty of that value.⁷ If the property of the deceased debtor exceed in value the amount of exemption in favor of the widow and minor children, administration may be ordered by the probate court,⁸ or the creditor may maintain a bill in

No administration is necessary for estates not exceeding the amount allowed to the widow or minor children.

¹ Provided the executor accept and faithfully administer the trust: Wash. Rev. 1891, § 955. The power of the trustees is derived from the will, and so long as they faithfully comply with its provisions their acts cannot be called in question by any court: *Newport v. Newport*, 5 Wash. 114.

² Rev. St. 1887, § 1266.

³ Acts 1882-3, p. 47. Under this statute a pending action against the deceased for libel is not such a "debt" which, being unpaid, would prevent its application; the widow, without administration, may be brought in to defend it, she being a quasi "personal representative": *McElhaney v. Crawford*, 96 Ga. 174.

⁴ *Dickhaut v. State*, 85 Md. 451.

⁵ Rev. St. Mo. § 2; *Pace v. Oppenheim*, 12 Ind. 533; *Clark v. Fleming*, 4 S. E. R. 12. Similar provisions exist *i. a.* in Alabama (*Howle v. Edwards*, 113 Ala. 187), Arkansas, California (and the statute applies to separate estate of deceased wife; *Leslie's Estate*, 118 Cal. 72), Georgia, Illinois, and Oregon. And in many States administration is dispensed with when, on the return of the inventory, it appears that the estate is less than a given amount: see *ante*, § 83, p. * 172.

⁶ *Soubiran v. Rivollet*, 4 La. An. 328.

⁷ *Danby v. Dawes*, 81 Me. 30.

⁸ Rev. St. Mo. 1889, § 2.

equity to subject the excess held by the widow or minor children to the satisfaction of his debt.¹

§ 203. **Administration in Louisiana.** — The descent of property is not governed by the same rule in Louisiana as in the other States, but is modelled after the law prevalent on the continent * of Europe. Property, personal as well as real, may there [* 437] pass directly to the heir, without any official intervention whatever. Heirs are described as of three kinds: testamentary, or instituted heirs; legal heirs, or heirs of the blood; and irregular heirs. They may, as above suggested, take directly and absolutely, and in such case become liable out of their own property for all debts of the decedent, in like manner as the *suus hæres*, or the *hæres necessarius*, under the ancient Roman law;² or they may renounce the succession, in which case they are not liable for any of the debts, nor entitled to any of the property of the estate; or they may claim benefit of inventory, when an administrator is appointed to manage the estate, pay its debts, and distribute the surplus.³ Minors can only take with benefit of inventory, hence partition between them and adults can only be made upon the appointment of an administrator;⁴ but where a succession is not in debt, the tutrix of the minor children may recover the property of the succession, and give valid acquittances therefor, without administration.⁵ A beneficiary heir does not represent the estate, and cannot be sued by a creditor of the succession.⁶ Where a legatee dies before the testator, and the latter leaves no debts to be paid, the appointment of an executor becomes inoperative;⁷ and an administrator will not be appointed unless there be an absolute necessity for it.⁸ But a judgment creditor of an estate can sustain no petitory action against one alleged to be in possession of property belonging to the succession when there is no administrator.⁹

¹ *Cameron v. Cameron*, 82 Ala. 392, 395.

² *Ante*, § 170.

³ Code La. tit. "Successions."

⁴ *Dees v. Tildon*, 2 La. An. 412; *Succession of Duclolange*, 1 La. An. 181; 191. *Martin v. Dupré*, 1 La. An. 239.

⁵ *Martin v. Dupré*, *supra*; *Succession of Sutton*, 20 La. An. 150.

⁶ *State v. Leckie*, 14 La. An. 541.

⁷ *Succession of Dupuy*, 4 La. An. 570.

⁸ *Alleman v. Bergeron*, 16 La. An.

⁹ *Louaillier v. Castille*, 14 La. An. 777.

OF THE INDUCTION TO THE OFFICE OF EXECUTOR AND ADMINISTRATOR.

CHAPTER XXIII.

OF THE PRELIMINARIES TO THE GRANT OF LETTERS TESTAMENTARY AND OF ADMINISTRATION.

§ 204. **Local Jurisdiction to grant Letters Testamentary and of Administration.**—Whatever may have been the law in ancient times, it is certain that at the time of the passing of the Court of Probate Act,¹ the ecclesiastical court was, in England, the only court in which the validity of wills of personality, or of any testamentary paper whatever relating to personality, could be established or disputed, except certain courts baron.² In the United States this jurisdiction, and the power to appoint executors and administrators, are vested in probate courts, or courts having probate powers, by whatever name known.³

Local courts in England authorized to grant letters testamentary and of administration.

It is unimportant to consider, in this connection, the rules by which the local jurisdiction of testamentary courts was determined in England, previous to the enactment of the statute of 20 & 21 Vict. [* 439] c. 77, or the doctrine of *bona notabilia* affecting this *jurisdiction.⁴ The rule in America is universal, that administration may be granted in any State or Territory where unadministered personal property of a deceased person is found, or real property subject to the claim of any creditor of the deceased; and that probate of the will of any deceased person may be granted in any State where he leaves personal or real property.

Court of probate jurisdiction of the county or district of the domicile at time of death grants letters.

¹ 20 & 21 Vict. c. 77.

² Wms. [288]. An interesting account of the ecclesiastical courts having testamentary jurisdiction in England is given in Foster's "Doctors' Commons, its Courts and Registries," published in London, 1871. It is there said that prior to the year 1858 there were 372 such courts, whose several names and numbers are thus stated: "Provincial and

Diocesan Courts, 36; Courts of Bishops' Commissaries, 14; Archidiaconal Courts, 37;" of Peculiar Jurisdictions: "Royal, 11; Archiepiscopal and Episcopal, 14; Decanal, Subdecanal, etc., 44; Prebendal, 88; Rectorial and Vicarial, 63; other Peculiars, 17; Courts of Lords of Manors, 48; = 372." See also *ante*, § 137.

³ *Ante*, §§ 140, 142.

⁴ *Ante*, § 139; *post*, § 205.

As between the several courts within the same State or sovereignty, jurisdiction attaches primarily to that tribunal which is invested with probate powers for the county or territorial district which includes the domicile of the testator or intestate at the time of his death, without regard to the place of his death or situs of his property.¹

Without regard to place of death or situs of property.

To grant letters on the estate of a deceased person the probate court must find as a fact, and thus judicially determine, that the deceased had his domicile in the county or territorial district over which the jurisdiction of the court extends (or, if a non-resident of the State, that he left property there), for otherwise the court would have no jurisdiction to grant letters, or take probate of a will. It was

Jurisdiction depending on residence of the deceased in the county.

formerly held in many States, that notwithstanding this finding and adjudication by the court, proof might be made in a collateral proceeding showing that such finding and adjudication was erroneous, and that as a matter of fact the decedent was at the time of his death domiciled in a different county; and that in such case the grant of letters was void *ab initio* for the want of jurisdiction.² But the more

reasonable doctrine is gaining ground, and is now held in nearly all the States, that letters so granted, while they are voidable when properly assailed, are valid until

Not collaterally assailable.

revoked in a direct proceeding.³ In the following, and probably other States, letters testamentary and of administration are held to be unimpeachable collaterally on this ground; viz.: in Alabama,⁴ California,⁵ District of Columbia,⁶ Georgia,⁷ Louisiana,⁸ Maine,⁹ Massachusetts,¹⁰ Mississippi,¹¹ Missouri,¹² Montana,¹³ Nebraska,¹⁴ New York,¹⁵ Oregon,¹⁶ Tennessee,¹⁷ and Texas.¹⁸ It is so provided by statute in England¹⁹ and in some of the American States.²⁰ But

¹ *McBain v. Wimbish*, 27 Ga. 259, 261; *Johnson v. Beazley*, 65 Mo. 250; *McCampbell v. Gilbert*, 6 J. J. Marsh. 592; *Succession of Williamson*, 3 La. An. 261; *Holyoke v. Haskins*, 5 Pick. 20; *Wilson v. Frazier*, 2 Humph. 30.

² See *ante*, § 145, in connection with the subject of the conclusiveness of judgments of probate courts.

³ See *post*, § 274, treating of the consequences of revoking letters testamentary and of administration.

⁴ *Colbart v. Allen*, 40 Ala. 155; *Kling v. Connell*, 105 Ala. 590.

⁵ *In re Griffith*, 84 Cal. 107, 110.

⁶ *Railroad Co. v. Gorman*, 7 Dist. Col. App. 91, 107.

⁷ *Tant v. Wigfall*, 65 Ga. 412.

⁸ *Duson v. Dupré*, 32 La. An. 896; *Garrett v. Boling*, 37 U. S. App. 42.

⁹ *Record v. Howard*, 58 Me. 225.

¹⁰ *McFeeley v. Scott*, 128 Mass. 16.

¹¹ *Ames v. Williams*, 72 Miss. 760, discussing the point on principle, p. 771.

¹² *Johnson v. Beazley*, 65 Mo. 250, and subsequent cases.

¹³ *Ryan v. Kinney*, 2 Mont. 254.

¹⁴ *Missouri P. R. Co. v. Bradley*, 51 Neb. 596, 607; *Bradley v. Missouri P. R. Co.*, 51 Neb. 653.

¹⁵ *Bolton v. Shriever*, 135 N. Y. 65.

¹⁶ *Holmes v. Oregon R. R.*, 7 Sawy. 380.

¹⁷ *Eller v. Richardson*, 89 Tenn. 575, 579.

¹⁸ *Lyne v. Sanford*, 82 Tex. 58, 62.

¹⁹ 20 & 21 Vict. c. 77, § 77.

²⁰ Massachusetts: Publ. St. 1882, ch. 132, § 15; *McFeeley v. Scott*, 128 Mass. 16; Maine (incorporating the Massachusetts statute): *Record v. Howard*, 58

in Rhode Island the old rule, holding letters issued in a county in which the deceased was not domiciled at the time of his death, void and collaterally assailable, was announced in a comparatively recent case.¹ So in Kentucky² and Connecticut.³ In Montana a similar view is intimated, but not decided.⁴

Jurisdiction once attaching is not lost by a change of the territorial limits or boundaries of the county or district after the death of the testator or intestate;⁵ but upon a proper representation the court before which proceedings are pending may, it seems, by its order to transfer the proceedings, confer jurisdiction upon the court in the new county or district.⁶

Jurisdiction
not lost by
change of
territory.

If the deceased had, at the time of his death, no fixed place of residence, letters may be granted in the county where he died; or if he died abroad, in any county where his property may be found; and if he left property in more than one county, then in any of them.⁷ It is obvious, however, that there can be but one grant of administration on the same estate in the same sovereignty or State; and since the jurisdiction which has once attached remains until final completion of the [* 440] administration, the court first exercising * jurisdiction will retain it to the exclusion of every other court in the State.⁸

Jurisdiction in
county where
deceased resi-
dent died, if he
had no fixed
domicil;
or if he died
abroad, in any
county where
he left prop-
erty.

But if once
granted in any
county, no let-
ters can be
granted in any
other in the
same State.

§ 205. **Jurisdiction over the Estates of Deceased Non-residents.**
—No administration can be granted in the case of a deceased non-

Me. 225, commending the change in the law.

¹ *People's Savings Bank v. Wilcox*, 15 R. I. 258.

² *Miller v. Swan*, 91 Ky. 36, 38.

³ *Olmstead's Appeal*, 43 Conn. 110.

⁴ The majority of the court deciding that the evidence did not warrant a finding that the decedent resided in a county different from that in which the administrator was appointed: *State v. Benton*, 12 Mont. 66, 74.

⁵ Thus, if after the death of the intestate that portion of the county in which he resided at the time of his death is erected into a new county, or attached to another county, the probate court of the old county still retains its jurisdiction: *Estate of Harlan*, 24 Cal. 182, 187; *Page v. Bartlett*, 101 Ala. 143; *Jones v. Rountree*, 96 Ga. 230; *McBain v. Wimbish*, 27 Ga. 259, 261; *Bugbee v. Surrogate*, 2 Cow.

471; *Lindsay v. McCormack*, 2 A. K. Marsh. 229.

⁶ *Knight v. Knight*, 27 Ga. 633, 636. And the legislature, in some States, may by special act confer such jurisdiction: *Wright v. Mare*, 50 Ala. 549.

⁷ *Leake v. Gilchrist*, 2 Dev. L. 73. In Mississippi an appointment was sustained in a county where the greater part of the personal property of the decedent was situated, although his domicil was in another county in the same State: *Weaver v. Norwood*, 59 Miss. 665.

⁸ *People v. White*, 11 Ill. 341; *Watkins v. Adams*, 32 Miss. 333; *Ex parte Lyons*, 2 Leigh, 761; *Ramey v. Green*, 18 Ala. 771, 774; *Pawling v. Speed*, 5 T. B. Mon. 580; *Seymour v. Seymour*, 4 Johns. Ch. 409; *Chow v. Brockway*, 21 Oreg. 440; *Estate of Scott*, 15 Cal. 220; *In re Griffith*, 84 Cal. 107, 110; *Hewitt's Appeal*, 58 Conn. 223; *Gregory v. Ellis*, 82 N. C. 225; *Slinger's Will*, 72 Wis. 22.

No letters can be granted on the death of a non-resident unless there be property to administer.

resident, unless he left property within the jurisdiction of the court making the appointment; letters granted in violation of this rule are void.¹ A claim for damages prosecuted for the benefit of the widow and children or next of kin is held in Kansas not to constitute assets; and letters granted on the estate of a non-resident having no other assets in the State are held void.² So in Indiana³ and in Kentucky it was held by the Federal Circuit Court that such right of recovery constituted no assets upon which administration could be granted in Kentucky on the estate of a deceased non-resident, although if recovery be had, it would, under the statutes of Kentucky, form part of the decedent's personal estate, and be liable to the payment of his debts, and go to the distributees like other property of the decedent.⁴ A different conclusion is reached in other States, where "the fact that the statute gives such a right of action to the personal representative, and to him alone, implies the right to appoint, if necessary, an administrator to enforce it;"⁵ and "where there is property or a fund or right of action which cannot otherwise be made available, it is competent for the probate court to appoint an administrator for the sole purpose of collecting and receiving assets which will not be general assets of the estate of his intestate or liable for his debts, but which will belong to particular persons who by law or by contract with the deceased will be entitled thereto."⁶ In such case, it is for the probate court to determine whether there is an apparent claim, a *bona fide* intention to pursue it, and that administration is necessary to its pursuit.⁷ That it is the duty of the probate court to appoint under such circumstances seems to admit of no doubt; for if the right to bring the action is given to no one but an administrator, the refusal to appoint one would render the statute giving the remedy nugatory.

¹ Miller v. Jones, 26 Ala. 247; Jeffersonville R. R. v. Swayne, 26 Ind. 477; Thumb v. Gresham, 2 Metc. (Ky.) 306; Blewit v. Nicholson, 2 Fla. 200; Goodrich v. Pendleton, 4 John. Ch. 549; Christy v. Vest, 36 Iowa, 285; Miltenberger v. Knox, 21 La. An. 399; Patillo v. Barksdale, 22 Ga. 356; King v. U. S., 27 Ct. Cl. 529.

² Perry v. St. Joseph R. R., 29 Kans. 420.

³ Jeffersonville R. R. v. Swayne, 26 Ind. 477, 486.

⁴ Marvin v. Maysville R. R., 49 Fed. R. 436. But see later Kentucky case *infra*.

⁵ Hutchins v. St. Paul R. R., 44 Minn. 5; Brown v. L. & N. R. R., 97 Ky. 228, 232; Findley v. Chicago R. R., 106 Mich. 700; Morris v. Chicago R. R., 65 Iowa, 727, 728;

Missouri P. R. Co. v. Bradley, 51 Neb. 596, 600 (this case sustains by a unanimous decision the doctrine above stated, as to the power to grant administration, though the proceeds would not constitute assets in the general sense; but on the question whether the death of a non-resident from an injury caused by the negligence of railroad employees authorizes the court of the county wherein the accident happened, to grant letters, three commissioners and one of the judges dissent).

⁶ Sargent v. Sargent, 168 Mass. 420, 424. Such is the case where the fund is a gratuity paid by the United States Government: *post*, § 306.

⁷ Hartford R. R. v. Andrews, 36 Conn. 213.

Where property of a deceased non-resident is found within the State, the court of the county in which it, or a part of it, may be situated, will grant administration at the request of any person being interested.¹ In England the property of a non-resident sufficient to authorize a grant of administration was called *bona notabilia*; this term is not technically applicable in the United States, but writers and judges find it convenient to use it in speaking of the jurisdiction conferred by the several kinds of property for the purposes of administration. "Personal property," says Judge Cooper of the Supreme Court of Mississippi, "whether of a tangible or an intangible character, is considered as located, for the purposes of administration, in the territory of that State whose laws must furnish the remedies for its reduction to possession."² At common law, says Phelps, J.,³ the site of administration in respect of debts due a deceased person never followed the residence of the creditor. "They are always *bona notabilia*, unless they happen to fall within the jurisdiction where he resided. Judgments are *bona notabilia* where the record is; specialties where they are at the time of the [* 441] *creditor's decease; and simple contract debts where the debtor resides."⁴ Thus, it is held that the court of a county in which the deceased non-resident had obtained a judgment is competent to hear proof of his will, and grant letters thereon;⁵ or where an action will lie against the decedent to set aside a conveyance in fraud of his creditors;⁶ or where his debtor resides.⁷ So the place where a life insurance company has an office and an agent upon whom process may be served is the situs of property so as to support administration on the estate of the assured, although domiciled in another State at the time of his death, if the policy of insurance was located in the State granting the letters;⁸ and if suit

Bona notabilia.

Debts.

Judgments.

Situs of simple contract debts.

Life insurance policy, government debt.

¹ Bowles v. Rouse, 8 Ill. 409, 422; Sprayberry v. Culberson, 32 Ga. 299; Hyman v. Gaskins, 5 Ired. L. 267; Spencer v. Wolfe, 49 Neb. 8.

² Speed v. Kelly, 59 Miss. 47, 51.

³ In Vaughn v. Barret, 5 Vt. 333, 337. To same effect, Bell, J., in Taylor v. Barron, 35 N. H. 484, 494; Thompson v. Wilson, 2 N. H. 291; Emery v. Hildreth, 2 Gray, 228, 230; and see cases cited *post*, § 309, where this subject is further treated.

⁴ See cases cited *post*, § 309.

⁵ Thomas v. Tanner, 6 T. B. Mon. 52, 58.

⁶ Bowdoin v. Holland, 10 Cush. 17; Nugent's Estate, 77 Mich. 500.

⁷ Stearns v. Wright, 51 N. H. 600;

Murphy v. Creighton, 45 Iowa, 179; Sullivan v. Fosdick, 10 Hun, 173, 180; Swancy v. Scott, 9 Humph. 327; Wyman v. Halstead, 109 U. S. 654. See, as to the situs of debts, *post*, § 309.

⁸ New England Co. v. Woodworth, 111 U. S. 138, 145; N. Y. Life Insurance Co. v. Smith, 67 Fed. (C. C. A.) 694; Shields v. Ins. Co., 119 N. C. 380. See, however, *contra*, Moise v. Life Association, 45 La. An. 736. An interest in an insurance policy payable upon the death of another constitutes assets and will authorize the grant of letters in the county where the policy is: Johnston v. Smith, 25 Hun, 171, 176.

be instituted on the policy, and subsequently letters be granted to an administratrix in the State where the company has its home office, the principle of comity between States calls for the refusal on the part of the courts of the latter State to entertain jurisdiction of a second suit for the same indebtedness.¹ Debts due from the government may be collected by the domiciliary administrator in any State where the government chooses to pay;² and such claims are not located at the seat of government so as to be local assets sufficient alone to support a grant of letters on the estate of a non-resident decedent.³

The cause of action against a debtor must be one which is enforceable against him;⁴ but if it be a *bona fide* claim, the administration will not be avoided, though it prove, ultimately, to be invalid.⁵

Notes, bonds, stocks, claims. Negotiable promissory notes, bonds payable to the bearer, or evidences of debt to which the title passes by manual delivery or simple indorsement, are *bona notabilia* in any State where they may be found; but the debtor's residence is not sufficient to confer title upon the ancillary administrator unless they come actually into his hands.⁶ Shares of stock of a railroad corporation are *bona notabilia* in the county where the stock-books are kept, transfers made, and dividends paid;⁷ shares of stock in a private corporation where its place of business is.⁸ And a note secured by mortgage, where the property is situated out of which payment may be enforced.⁹ The situs of real estate con-

Real estate.

¹ *Sulz v. M. Association*, 145 N. Y. 563.

² See cases cited in § 309.

³ *King v. U. S.*, 27 Ct. Cl. 529; *Coit's Estate*, 3 D. C. Ct. App. 246.

⁴ A right of action which is local to the State creating it will not support the grant of administration in another State: *Illinois Central R. R. Co. v. Cragin*, 71 Ill. 177.

⁵ *Sullivan v. Fosdick*, 10 Hun, 173; *Holyoke v. Mutual Life Ins. Co.*, 22 Hun, 75.

⁶ *Goodlett v. Anderson*, 7 Lea, 286, 289; *Shakespeare v. Fidelity Co.*, 97 Pa. St. 173, 177; *Bears v. Shannon*, 73 N. Y. 292, 298; *Moore v. Jordan*, 36 Kans. 271.

⁷ *Arnold v. Arnold*, 62 Ga. 627, 637.

⁸ *Winter v. London*, 99 Ala. 263. But the rights of a legatee of stock, though living in the State of the corporation, are determined by the laws of the testator's foreign domicil, to which he must look for their enforcement: *Russell v. Hooker*, 67 Conn. 24, holding such stock to be assets at the testator's domicil, though ancillary

administration was granted in the State where the corporation and the legatee resided.

⁹ *Clark v. Blackington*, 110 Mass. 369, 373; *Willard v. Wood*, 1 Ct. App. D. C. 44, 62. It is held in Kansas that on the death of the owner of a note secured by real estate in another State, the title to the note vests in the domiciliary administrator, who may sue for the foreclosure of the mortgage in the State where the land lies (a foreign administrator having authority to sue there), on the ground that the mortgage is a mere security, and incident to the note: *Eells v. Holder*, 2 McCrary, 622. But the ancillary administrator has not the title to the property, and hence cannot sue in another State where the land is situate: *Moore v. Jordan*, 36 Kans. 271. In Minnesota it is held that a foreign administrator may foreclose a mortgage of lands in that State, where the mortgage is to the decedent, his executors, administrators, etc., the exercise of such power resting on contract: *Holcombe v. Richards*, 38 Minn. 38. So it is

fers jurisdiction to take probate of a will affecting it, and [* 442] in consequence thereof to grant letters testamentary or * of administration,¹ without reference to the deceased owner's domicile.

Property brought into the State for collusive purposes, or temporarily, after the owner's death, does not confer jurisdiction to grant administration thereon;² but if a debtor voluntarily come to another State, although after the creditor's death, administration may be had in such State at the instance of creditors or other persons interested.³

§ 206. **What constitutes Domicil or Residence.** — It is not always easy to prove what was the domicile or place of residence of a person at the time of his death, so as to fix the jurisdiction over his estate in the proper forum. It has been defined as being, in the common-law sense, the place where one has his true, fixed and permanent home and principal establishment, to which whenever he is absent he has the intention of returning.⁴ When once acquired, it continues until by free choice another is substituted therefor. Hence there can be no abandonment or acquisition of a domicile by one who is adjudicated of unsound mind,⁵ or by one not *sui juris*; the domicile of the child follows that of its parents, and the domicile of the wife follows that of her husband.⁶ Absence from the domicile, and residence elsewhere for reasons of health, comfort, business, recreation, temporary convenience, and the like,⁷ do not constitute or indicate an aban-

Definition of domicile.

It cannot be abandoned by one, not *sui juris*;

nor without concurrence of the intent and fact of abandonment.

said in Mississippi that a note secured on land in that State is not within the statute requiring personal property to be distributed under its own laws, if the mortgage and note are found at the foreign domicile of the intestate, who has no creditors, heirs, or property there: *Speed v. Kelly*, 59 Miss. 47.

¹ *Apperson v. Bolton*, 29 Ark. 418, 437, citing *Clark v. Holt*, 16 Ark. 257, 265; *Prescott v. Durfee*, 131 Mass. 477; *Rosenthal v. Renick*, 44 Ill. 202, 207; *Sheldon v. Rice*, 30 Mich. 296, 302; *Bishop v. Lalouette*, 67 Ala. 197, 200; *Lees v. Wetmore*, 58 Iowa, 170, 179. In Alabama it is held that the death of an alien dying abroad, and leaving land only in Alabama, will uphold the jurisdiction of the probate court of the county where the land lies, to grant letters: *Nicrosi v. Guily*, 85 Ala. 365.

² *Christy v. Vest*, 36 Iowa, 285; *Varnier v. Bevil*, 17 Ala. 286.

³ *Pinney v. McGregory*, 102 Mass. 186, 189; *Fox v. Carr*, 16 Hun, 434, 437.

⁴ *Price v. Price*, 156 Pa. 617; *Thorn-dike v. Boston*, 1 Met. (Mass.) 242, 245; *Gilman v. Gilman*, 52 Me. 165; *Story*, Conf. L., §§ 39 *et seq.* The place of residence is *prima facie* a man's domicile: *Graveley v. Graveley*, 25 S. C. 1, 17. "A person domiciled in Missouri may spend the greater part of a year, or series of years at another place, without thereby forfeiting his domicile": *In re Walker*, 1 Mo. App. 404.

⁵ As to the domicile of persons of unsound mind, see *Woerner on Guardianship*, § 206, showing also where the domicile of the *non compos* may be changed with the guardian's consent.

⁶ By her marriage a woman *eo instanti* acquires the domicile of her husband, which is in nowise affected by the fact that she dies shortly thereafter, and before going to the State of his domicile: *McPherson v. McPherson*, 70 Mo. App. 330.

⁷ The Supreme Court of Washington seems unwilling to recognize the distinc-

donment of the domicil. To work a change of domicil, there must be a concurrence of *the intention* to acquire a new domicil with *the fact* of having * acquired one and abandoned the [* 443] former one, without the intention of returning thereto.¹

Where one dies while in the act of moving with his family from one State to another, with the intention of acquiring a new domicil in the State of their destination, and after his death the family continue their journey with the property of the estate, it was held that letters of administration may well be granted in the place of destination where the family located.² It is suggested by Mr. Schouler that the status of distribution and of testacy should be rather according to the law of the domicil he left, as the true locus of a last domicil.³

In New York the property of a deceased Indian of the Six Nations is not subject to administration by the State authorities, and letters granted are void;⁴ but in Alabama the appointment of an administrator on the estate of an Indian, who died

tion between domicil and residence made in the text as affecting the local jurisdiction of courts in granting administration: *State v. Superior Court*, 11 Wash. 111, 115. The difficulty arises out of the use of the word "permanent" in connection with residence. "None of the cases so cited in any manner distinguish as between permanent residence and domicil," says the distinguished judge rendering the opinion, which is, so far as these words have any bearing upon the subject under consideration, accurately true. But the distinction made in the text, and in the cases cited, and in numerous other cases, is between domicil and temporary residence. See the definition of "domicil" in Black's Law Dictionary and other text-books. See also Woerner on Guardianship, § 26.

¹ Schoul. Ex., § 21, citing *Udny v. Udny*, L. R. 1 H. L. Sc. 451, 458; *Story*, Conf. L., § 45; *Wilbraham v. Ludlow*, 99 Mass. 587; *Haldane v. Eckford*, L. R. 8 Eq. 631, 640; *Colt, J.*, in *Hallet v. Bassett*, 100 Mass. 167, 170. "The mere intention to change the domicil, without an actual removal with the intention of remaining, does not cause a loss of the domicil": *State v. Hallett*, 8 Ala. 159, 161; *George v. Watson*, 19 Tex. 354; *Walker v. Walker*, 1 Mo. App. 404, 413; *Chalmers v. Winfield*, L. R. 36 Ch. D. 400; *Price v. Price*, 156 Pa. St. 617; *Fidelity Trust Co. v. Preston*, 96 Ky. 277.

² "Inasmuch, however, as this property was *in transitu* when he died, and afterwards reached its destination, and as many inconveniences would result from the absence of power in our county courts to regulate its administration, it should be regarded as being at the time of his death constructively in this State, under the circumstances here presented; solely, however, for the purpose of enabling a county court in this State to grant administration thereon": *Burnett v. Meadows*, 7 B. Mon. 277. See *White v. Tenant*, 31 W. Va. 790, 792, and authorities cited.

³ The case cited by him does not support the doctrine of his text, because no administration was granted in *State v. Hallett*, 8 Ala. 159; but see *Embry v. Millar*, 1 A. K. Marsh. 300, cited in *Burnett v. Meadows*, *supra*, as indicating such a view. In *White v. Tenant*, 31 W. Va. 790, it is held that where one left his residence in West Virginia, and with his family moved to Pennsylvania, intending to reside there, the latter is his place of domicil, although next day he returned to his former home, and was detained there by sickness until his death.

⁴ Because the "Six Nations" are treated as a nation with sovereign power in some respects: *Dole v. Irish*, 2 Barb. 639; see also *United States v. Payne*, 4 Dillon, 387, and cases cited.

before his nation became subject to the laws of the State, by the orphan's court of the county in which property left by him was afterward found, was held valid;¹ while in California it was held that probate courts have no jurisdiction over the estate of a person who died before the adoption of the State constitution.²

§ 207. **Proof of Death.** — The death of the testator whose will is to be proved, or of the intestate whose estate is asked to be [* 444] * subjected to administration, is a question of fact of which proof must be made before the jurisdiction of the court attaches. Ordinarily, the death of a person leaving property for administration is a matter of such notoriety that proof is of easy access among the neighbors, relatives, and persons interested in the estate. But where the testator or intestate was domiciled abroad, or died away from home in a remote country direct proof is not always attainable; and death must in such cases be established by circumstantial evidence, the most usual of which is such person's prolonged and unexplained absence from home without being heard from. When such absence from home³ has continued for above seven years,⁴ within which time no intelligence of his existence has reached his relatives, friends, or acquaintances, it will be presumed that he is dead,⁵ and proof of these circumstances, un rebutted, will support the adjudication of the probate

Death of testator or intestate must be proved before court has jurisdiction.

Presumption of death arises after absence for seven years without being heard from.

¹ Brashear v. Williams, 10 Ala. 630.

² Downer v. Smith, 24 Cal. 114; Hardy v. Harbin, 4 Sawy. 536.

³ That is, from an *established place of residence*; for no presumption arises out of absence from any other place: Stinchfield v. Emerson, 52 Me. 465; Spurr v. Trimble, 1 A. K. Marsh. 278, 279. See also Francis v. Francis, 180 Pa. St. 644.

⁴ The mere absence without being heard from for any period short of seven years does not raise the presumption of death: Newman v. Jenkins, 10 Pick. 515; Donaldson v. Lewis, 7 Mo. App. 403, 408. And even when the absence is for more than seven years, the attending circumstances may be such as to make the presumption unreasonable: Dickens v. Miller, 12 Mo. App. 408, 413. Where a statute provides that the presumption shall arise after an absence from the State for a certain time, it is held not to exclude all presumptive evidence of death where it does not appear that the party left the State: so held in Bank of Louisville v. Board, 83 Ky. 219, 230; see, as to the construction of a similar statute, Dickens v. Miller, *supra*; and

where the statute is inapplicable, as where the deceased was not a resident of the State, the general presumptions of death govern as at common law: Flood v. Growney, 126 Mo. 262.

⁵ Best on Ev., § 409; Whart. Ev., § 1274. "Ordinarily, in the absence of evidence to the contrary, the continuance of the life of an individual to the common age of man will be assumed by presumption of law. The burden of proof lies upon the party alleging the death of the person; but after an absence from his home or place of residence seven years without intelligence respecting him, the presumption of life will cease, and it will be incumbent on the other party asserting it to prove that the person was living within that time": Howard, J., in Stevens v. McNamara, 36 Me. 176, 178; Esterly's Appeal, 109 Pa. St. 222. But mere proof of absence, without proof that the absentee was never heard of, is insufficient to create a presumption of death: Shriver v. State, 65 Md. 278, 287. And hearsay evidence that he is alive is admissible: Dowd v. Watson, 105 N. C. 476.

court necessary to give it jurisdiction.¹ This presumption does not, obviously, attach to any particular time within the seven years, but in the absence of facts indicating the time of death, assumes the absentee to have lived through the whole period.²

* Death may also be inferred from the absence of a person [*445] from his home, without being heard from for a period less

than seven years, if proof be made of other circumstances tending to show his death.³ Thus, it is held that death may be inferred from testimony showing that when last heard from the person was in contact with some specific peril likely to produce death, or that he disappeared under circumstances inconsistent with a continuation of life, when considered with reference to those influences and motives which ordinarily control and direct the conduct of rational beings.⁴ Presence on board of a ship which sailed for a given port at which she did not arrive, and was never heard of for more than double the period of her longest voyage, is said to make the death of all on board of her as certain as anything not seen can be, and the time of such death would fall within the period usually assigned as the longest for such a voyage.⁵ Evidence of one's long absence without communicating with his friends, of character and habits making the abandonment of home and family improbable, and of want of all motive or cause for such abandonment, was held sufficient to support the presumption of death.⁶

The *factum* of death may, it seems, be proved by hearsay evidence; "for, as has been said, that a person has been missing at a particular

¹ And it matters not that the relatives may believe such person to be alive: *White-side's Appeal*, 23 Pa. St. 114, 116.

² *Eagle v. Emmet*, 4 Bradf. 117; *Reedy v. Millizen*, 155 Ill. 636; *Schaub v. Griffin*, 84 Md. 557; *Tilly v. Tilly*, 2 Bland Ch. 436, 444; *Kauz v. Order of Red Men*, 13 Mo. App. 341. This point is very fully considered in *Evans v. Stewart*, 81 Va. 724, 735, quoting and reviewing English and American authorities, and announcing the true rule to be that the *onus* of proving death at any particular period, either within the seven years or otherwise, is not with the party alleging death at such particular period, but is with the person to whose title that fact is essential: p. 737. See also *Phenix's Trust*, L. R. 5 Ch. App. Cas. 139, 151; *Davie v. Briggs*, 97 U. S. 628; *Hoyt v. Newbold*, 45 N. J. L. 219; *Whitely v. Equitable Soc.*, 72 Wis. 170.

³ 3 Redf. on Wills, 4, note 1: "Where the probabilities of death are corroborated by circumstances; or where reliable reputa-

tion of the fact and manner of his death has reached the neighborhood of the testator's residence; or in case of his being domiciled abroad, where such reputation has reached his friends and relatives in such form as to gain general credit." *Ringhouse v. Keever*, 49 Ill. 470; *Northwestern Insurance Co. v. Stevens*, 36 U. S. App. 401, 409, citing numerous cases.

⁴ In either case the fact of death may be inferred at such time within seven years as from the testimony shall seem most probable: *Hough, J.*, in *Lancaster v. Washington Life Ins. Co.*, 62 Mo. 121, 128; *Davie v. Briggs*, 97 U. S. 628, 634; *White v. Mann*, 26 Me. 361, 370; *Smith v. Knowlton*, 11 N. H. 191, 197.

⁵ *Gerry v. Post*, 13 How. Pr. 118, 120; see also *Johnson v. Merithew*, 80 Me. 111.

⁶ *Tisdale v. Connecticut Life Ins. Co.*, 26 Iowa, 170, 176; *Hancock v. American Life Ins. Co.*, 62 Mo. 26, 29; *Succession of Vogel*, 16 La. An. 139.

time, accompanied with a report and general belief of his death, must be, in many cases, not * only the best, but the only evidence which can be supposed to exist of his death.”¹ It is so held by the Supreme Court of the United States, in a unanimous opinion,² and in several of the State courts.³

Even by hearsay.

Presumptions of survivorship among different persons exposed to the same peril, and not known to have survived, are not entertained in English or American courts. In California and Louisiana it is provided, following in this respect the Code Napoleon, that “if several persons, respectively entitled to inherit from one another, happen to perish by the same event, such as a wreck, a battle, or a conflagration, without any possibility of ascertaining who died first, the presumption of survivorship is determined by the circumstances of the fact. In the absence of circumstances of the fact, the determination must be decided by the probabilities resulting from the age, strength, and difference of sex according to the following rules: If those who have perished together were under the age of fifteen years, the eldest shall be presumed to have survived. If both were above the age of sixty years, the youngest shall be presumed to have survived. If some were under fifteen and some above sixty, the first shall be presumed to have survived. If those who have perished together were above the age of fifteen years and under sixty, the male must be presumed to have survived, where there was equality of age or a difference of less than one year. If they were of the same sex . . . the younger must be presumed to have survived the older.”⁴ The doctrine in England is stated, in the syllabus to the case of *Wing v. Angrave*,⁵ to be as follows: that “there is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause; . . . nor is there any presumption of law that all died at the same time; . . . the question is one of fact, depending wholly on evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined. The *onus probandi* is on the person asserting the affirmative.”⁶

¹ *Primm v. Stewart*, 7 Tex. 178, 181.

² *Scott v. Ratcliffe*, 5 Pet. 81, 86.

³ *Jackson v. Boneham*, 15 Johns. 226, 228; *Jackson v. Etz*, 5 Cow. 314, 319; *Ringhouse v. Keever*, 49 Ill. 470. Hearsay evidence that the person is alive is also admissible: *Dowd v. Watson*, 105 N. C. 476.

⁴ *Robinson v. Gallier*, 2 South. L. R. N. S. 508, quoting from the Civil Code of Louisiana, art. 936-939; Cal. Code Civ.

Pr., § 1963, pl. 40; *Hollister v. Cordero*, 76 Cal. 649, holding the murder of husband and wife perpetrated at the same time to be a calamity within the meaning of the Code.

⁵ 8 H. L. 183.

⁶ See an interesting account of the trial of Robinson's case, involving the question of survivorship, in the Circuit Court of the United States for the District of Louisiana, published in the *Southern Law Review*.

* The same doctrine is held by authors and judges to prevail in America.¹

§ 208. **Administration on the Estates of Living Persons.**—The weight of authority is very decidedly to the effect "that the decease of the supposed decedent is a prerequisite to the jurisdiction * of the court, and [* 448] that (if still living) he is wholly unaffected by the proceedings for the settlement of his estate."²

Death of the testator or intestate necessary to give jurisdiction.

The doctrine that the grant of letters testamentary, or of administration, on the estate of a person in fact living, but supposed to be dead, is an act beyond the jurisdiction of the court, and therefore so utterly void that no person is protected in dealing with the executor or administrator, even while his letters remain unrevoked, is firmly adhered to in nearly all of the States in which the question has arisen, and seems to command the acquiescence of even text-writers. Judge Redfield, the illustrious author of an American work on Wills, for many years one of the judges of the Supreme Court of Vermont, and one of the editors of the American Law Register during the last fifteen years of his life, rejoices in the recognition of this doctrine;³ Freeman is content to * mention the direction in [* 449] which the current of decisions runs;⁴ and Schouler disposes of the question in two lines, showing his assent to the doctrine that a grant of administration upon the estate of a living person is utterly void, and protects no one dealing with the appointee.⁵ Mr. Gary finds it "of course" that "the person himself, if he returns alive, is not bound by the adjudication, not being a party in any sense;" but deems it a solecism to say that a court does not *adjudicate* upon the primary jurisdictional fact upon which it proceeds to act.⁶ In the

supra, and giving a concise and comprehensive review of the doctrine of survivorship under the civil law, and in the different countries of Europe. It was held in this case that the provisions of the Louisiana Code did not apply, and the instructions to the jury were in consonance with the views announced in *Wing v. Angrave, supra*.

¹ *Johnson v. Merithew*, 80 Me. 111, in which the court says, after announcing the law as above stated: "In the absence of evidence from which the contrary may be inferred, all may be considered to have perished at the same moment; not because the fact is presumed, but because, from failure to prove the contrary by those asserting it, property rights must necessarily be settled on that theory" (p. 116); *Ellie's Will*, 73 Wis. 445, 458, 460; *Newell v. Nichols*, 75 N. Y. 78; *Cowman v. Rogers*,

73 Md. 403; *Smith v. Croom*, 7 Florida, 81; *Coye v. Leach*, 8 Metc. 371.

² *Freem. on Judgm.*, § 319 *a* (3d ed.). Other decisions in the same direction will be noticed *infra*. With the exception of the first two of the cases cited by Freeman, which directly adjudicate the question under consideration, they all contain either mere *dicta*, or adjudications upon cognate points only.

³ 15 Am. L. R. 212 *et seq.*

⁴ *Supra*, p. 448, note.

⁵ *Schoul. Ex.* § 160.

⁶ *Gary, Pr. L.* § 287, note 59. His commentary concerning the adjudication is directed to the case of *Mutual Benefit Life Ins. Co. v. Tisdale*, 91 U. S. 238, in which it is held that the Probate Court does not adjudicate the death of the person on whose estate the letters are granted: p. 243.

former edition of this work the subject was deemed of such importance as to justify a more extensive discussion; and the author's reasons for disagreeing with the current of authorities are therein more extensively set forth; since then the question has been authoritatively laid to rest by the decision of the Supreme Court of the United States,¹ and it will serve no useful purpose to present, here, more than a brief sketch of its origin and history.

§ 209. **Reasons for the Invalidity of such Administration.**—The courts holding void the grant of letters on the estate of a person not really, but only supposed to be dead, base the necessity of their ruling upon the lack of jurisdiction in the probate court. This depends, it is said, upon the *fact* of death; there being no death, there is no estate to administer, hence no basis for the jurisdiction of the probate court. The casual remark of Justices Buller and Ashhurst, in the case of *Allen v. Dundas*,² is generally referred to as authority. It is to be observed that this case turned upon the validity of an executor's acts under a will which had received probate, but was subsequently found to have been forged. The judges emphatically sustained the validity of the probate, and of all acts done thereunder,³ and then remark: "The case of the probate of a supposed will during the life of the party may be distinguished from the present, *because during his life the ecclesiastical court has no jurisdiction.*" A similar remark was made by Chief Justice Marshall in the case of *Griffith v. Frazier*,⁴ to illustrate the invalidity of the judgment of a court acting upon a matter not within its jurisdiction: "Suppose administration [* 450] to be * granted upon the estate of a person not really dead.

The act, all will admit, is totally void." In this case the question was upon the validity of a judgment suffered by an administrator *cum testamento annexo*, who had obtained letters while a regularly appointed executor had charge of the estate. The question under consideration was before the court in neither of these two cases.

In the case of *Burns v. Van Loan*,⁵ the *dictum* of Judge Marshall is quoted, but the judgment was not based upon this principle, there being a statute in Louisiana regulating the property of an absentee, which, as well as the requirement of proof of death, had been ignored in the grant of letters, for which reason the letters were held void.

But in the case of *Moore v. Smith*,⁶ Wardlaw, J., announced the law to be, as intimated in the *dicta* mentioned, that there was no

¹ *Scott v. McNeal*, 154 U. S. 34.

² 3 T. R. 125, 129, 130.

³ Justice Ashhurst concluded his remarks in these words: "But the foundation of my opinion is, *that every person is bound by the judicial acts of a court having competent authority*; and during the exist-

ence of such judicial act the law will protect every person obeying it."

⁴ 8 Cranch, 9, 23.

⁵ 29 La. An. 560, 564.

⁶ 11 Rich. L. 569, 572. Decided in 1858.

jurisdiction in the probate court unless there was in truth a deceased person. In the same year the Supreme Court of North Carolina held evidence that one upon whose estate administration had been granted was alive, to be admissible in a suit upon the administration bond, on the ground that, if such person were alive, the bond would be void.¹

In *Jochumsen v. Suffolk Savings Bank*,² the defendant was held liable to one upon whose estate letters had been granted after his absence for twelve years, for a debt which he had already paid to the administrator so appointed. Judge Dewey reaches his conclusion of the utter invalidity of the appointment, and of everything done by virtue thereof, from the previous Massachusetts cases holding void the appointment of an administrator by the court of a county in which the decedent did not at the time of his death reside;³ and points for confirmation of his view to the *dicta* * men- [* 451] tioned.

Other adjudications on this question then followed in rapid succession, almost unanimously holding such administrations, and everything done in consequence thereof, absolutely void: *United States v. Payne*,⁴ *Melia v. Simmons*,⁵ *D'Arusment v. Jones*,⁶ *Lavin v. The Emigrant Industrial Savings Bank*,⁷ *Stevenson v. Superior Court*,⁸ *Devlin v. Commonwealth*,⁹ * *Thomas v. The People*,¹⁰ [* 452] *Scott v. McNeal*,¹¹ *Springer v. Shavender*,¹² and *Carr v. Brown*.¹³ In all of them the same reason is given for the ruling, to wit, the want of jurisdiction over the subject-matter; the *dicta* by Justices Ashhurst, Buller, and Marshall, and similar remarks in a number of other cases, are invariably referred to. The same doctrine is announced in a *dictum* by Randall, C. J., of the Supreme Court of

¹ *State v. White*, 7 Fred. L. 116.

² 3 Allen, 87. Decided in 1861.

³ The doctrine holding as void letters granted in a county other than that in which the decedent was domiciled at the time of his death, is discussed *ante*, § 204. A statute of Massachusetts had peremptorily negatived the doctrine so announced by the court: Rev. St. Mass. 1836, ch. 83, § 12, the wisdom of which statute was commended by the courts of Maine (*Record v. Howard*, 58 Me. 225, 228) as well as by those of Massachusetts (*McFeely v. Scott*, 128 Mass. 16, 18. See the remarks of the editor reporting *Thompson v. Brown*, 16 Mass. 172, 180).

⁴ 4 Dillon, 387. Decided in 1877.

⁵ 45 Wis. 334. Decided in 1878.

⁶ 4 Lea, 251. Decided in 1880.

⁷ 18 Blatchf. 1. Decided in 1880.

⁸ 62 Cal. 60. Decided in 1882.

⁹ 101 Pa. St. 273. Decided in 1882.

In 1885 the legislature of this State regulated the grant of letters on the estates of persons absent for more than seven years, and provided for the safety of the interests of all parties concerned: Bright. *Purd. Dig., Suppl.* 1885, p. 2184 *et seq.*

¹⁰ 107 Ill. 517. Decided in 1883.

¹¹ 154 U. S. 34. Decided in 1894.

¹² 116 N. C. 12. Decided in 1895, affirmed on rehearing: 118 N. C. 33. In this case the heirs were not estopped to attack a sale of land as void on the ground that they had admitted, though erroneously, that their ancestor was dead, in the proceeding to sell the realty. The court, however, expressly reserved the effect of letters granted on an erroneous presumption of death from seven years' absence.

¹³ 38 Atl. R. 9. Decided in July, 1897

Florida,¹ quoting a similar *dictum* from a case decided in Virginia, to the effect that there are two exceptions to the conclusiveness of the judgments of probate courts collaterally: "As where the supposed testator or intestate is alive; or where, if dead, he has already a personal representative in being when the order is made granting administration on his estate."² So also in Texas.³ An English case is also mentioned as holding void the probate of a will upon motion of the supposed deceased testator himself.⁴

§ 210. **Cases holding Administration of Estates of Living Persons valid.**—The only cases met with directly holding that, so far [* 453] * at least as to protect innocent persons acting upon the faith of letters of administration issued by the surrogate upon due proof as to the death of the intestate therein named, such letters are conclusive evidence of the authority of the administrator to act, until the order granting them is reversed on appeal, or the letters are revoked or vacated, are those of *Roderigas v. East River Savings Institution*⁵ and *Scott v. McNeal*.⁶ The former was decided in the face of the case of *Jochumsen v. Suffolk Savings Bank*.⁷ The doctrine announced commanded the assent of but four of the seven judges of the Court of Appeals, three of them expressly dissenting, but giving no reasons, and was held by the federal courts to be in violation of the Fourteenth Amendment to the Constitution of the United States.⁸

The *Roderigas* case is mentioned with approval in later New [* 455] York cases;⁹ and *Chief Justice Beasley, speaking for the Supreme Court of New Jersey, says: "It is not necessary to affirm the doctrine of this [the *Roderigas*] reported case, though in passing it may not be out of place to remark that its reasoning, notwithstanding the adverse criticisms to which it has been subjected, appears to be of great weight."¹⁰ So Dillon, J., rendering the opinion in the case of *United States v. Payne*,¹¹ remarks, that much may

¹ In *Epping v. Robinson*, 21 Fla. 36, 49. Decided in 1884.

² *Andrews v. Avory*, 14 Gratt. 229, 236, *per* Moncure, J. (1858).

³ *Martin v. Robinson*, 67 Tex. 368, 375 (1887).

⁴ *In re Napier*, 1 Phillim. 83.

⁵ 63 N. Y. 460. Decided in 1875.

⁶ 5 Wash. 309, decided in 1892; but reversed by the U. S. Supreme Court.

⁷ 3 Allen, 87.

⁸ In *Lavin v. Emig Indust. Sav. Bank*, 18 Blatch. 1; *Scott v. McNeal*, 154 U. S. 34; *Carr v. Brown*, 38 Atl. R. 9. The principal reason given is the want of notice to the absentee, for which reason he was not bound by the judgment of the surrogate on the question of his death.

⁹ *O'Connor v. Huggins*, 113 N. Y. 511; *Bolton v. Schriever*, 135 N. Y. 65. In the latter case *Peckham, J.*, observes: "Criticisms have also been made in regard to the decision of the first *Roderigas* case. It is not needful to refer to them, or to again renew the discussion, which, as to this State, was ended by the decision in that case." On a second appeal of the *Roderigas* case (76 N. Y. 316), sometimes referred to as shaking the authority of the earlier decision, the former case was distinguished, but not overruled.

¹⁰ *Plume v. Howard Savings Institution*, 46 N. J. L. 211, 230 (1884).

¹¹ 4 Dill. 387, 389.

be said on both sides of the question, and that the Roderigas case may be distinguished on solid grounds from the case under consideration by him. The Supreme Court of Arkansas, though expressly withholding their judgment upon the validity of administration upon the estates of living persons, nevertheless held that where the administrator of the next of kin of a supposed decedent was paid by a bailee, under order of the probate court, the distributive share coming to his intestate from such supposed dead ancestor (who was in fact alive), such administrator was protected to the extent of all *bona fide* payments made by him out of such fund before learning that the owner was alive.¹

In the case of *Scott v. McNeal*² the Supreme Court of the State of Washington in a unanimous opinion squarely follow the Roderigas case, deciding, accordingly, that letters so granted cannot be collaterally impeached by proof that the supposed decedent is in fact alive. The argument, that by sustaining the validity of the administration the supposed decedent would be deprived of his property without due process of law, was met by the argument that "the proceeding is substantially *in rem*, and all parties must be held to have received notice of the institution and pendency of such proceedings where notice is given as required by law."³

§ 211. **Conclusiveness of Judgments.** — In the first edition of this work the attempt was made to show the necessity of giving effect to the judgments of courts rendered within the scope of the subject-matter of their jurisdiction, from which it would follow that the administration of the estate of one who was adjudged to be, but was not in reality, dead, is valid and binding, as to all acts done in good faith before the recall of the administration on the discovery that the owner was living. Since then, by the decision of the United States Supreme Court, this question has been definitively settled by the highest authority;⁴ and further discussion is therefore omitted here. [** 456-459]

§ 212. **Administration of Estates of Absent Persons.** — Administration of property becomes necessary, as we have seen, when its owner is, for any reason, incapable of exercising control over the same,—of asserting his *jus disponendum*.⁵ The practical reason which demands the interposition of the State is fully as strong when the owner of personal property — or of real property liable for his debts, or for the support of his family — has voluntarily or by compulsion absented himself, so that it is beyond his power to provide for his family or satisfy his creditors, as if he were dead, insane, or a minor.

¹ *Beam v. Copeland*, 54 Ark. 70 (1890). United States, and unanimously reversed:

² 5 Wash. 225. Decided in 1892. s. c. 154 U. S. 34.

³ Opinion by Scott, J. (all the judges concurring), p. 318. This case was appealed to the Supreme Court of the

⁴ *Scott v. McNeal*, 154 U. S. 34.

⁵ *Ante*, § 2.

It is the office of the State, in such cases, to assume that control over the property left by the owner which he, if he could himself act, and would act rationally, would exercise, — to cause such property to subserve its rational purpose. At common law the accomplishment of this function is brought about by the arbitrary presumption of a person's death after an unexplained absence from home of seven years, and subjecting his property to administration as if he were [* 460] dead. * In recognition of the inadequacy of the common law on this subject, the legislatures of several of the States have given voice to the practical views of the people, and provided means for the preservation and disposition of property under such circumstances.

Thus it is enacted in Missouri, that if any person be absent from the State for seven consecutive years, or shall have concealed himself, so as not to be heard of for seven years by the probate judge or the absentee's heirs, and not make himself or his whereabouts known to the probate judge or such heirs within two years after a notice of his supposed death shall have been published in a newspaper published in the county where his property is situate, he shall be presumed to be dead; and if letters testamentary or of administration shall be granted upon such person's estate, all payment of money or delivery of property to the executor or administrator of such person shall be a bar to all actions or claims of such absent person; and if such person do not appear before an order disposing of or distributing said estate shall have been made by such court, such order shall be a protection to such administrator for obedience to any order so made.¹

In Indiana, if a person leave the State and go to parts unknown for five years, leaving property without having made sufficient provision for the management of the same, and it is made to appear to the court having probate jurisdiction, after thirty days' notice to such person by publication in two newspapers, one published in the capital of the State and the other in the county, that such property is suffering waste or that the family is in need, he shall be presumed to be dead, and the court shall have the same jurisdiction over the estate of such person as if he were dead, and appoint an administrator of his estate with all the powers, rights, duties, and liabilities of an administrator of a decedent.²

[* 461] * In Louisiana, if the owner of property absent himself without appointing some one to take care of it, a curator is appointed to administer it, who has the same powers, duties, and annual compensation as a tutor, makes annual settlements, and has them homologated contradictorily with a curator *ad hoc* appointed for that purpose; and if such person has not been heard of for ten years, his administration ends, the property is delivered to the heirs,

¹ Rev. St. Mo. 1889, §§ 272, 273.

Baugh v. Boles, 66 Ind. 376, 384; Jones

² Ann. Rev. Ind. St. 1894, § 2385; v. Detchon, 91 Ind. 154, 156.

or sold, and the proceeds paid into the State treasury if there are no heirs.¹

In Rhode Island, the last will of a person absent from the State for three years without proof of his being alive may be proved, and administration granted on his estate "as if he were dead." If such person afterward return, or appoint an agent or attorney to act for him, the administrator must deliver up to him or such agent all the estate then remaining in his hands, after deducting all disbursements legally made, and such compensation for his trouble as the probate court may deem reasonable.² This statute is said, by Choate, J., to be unconstitutional, for the same reason on which he based the unconstitutionality of the New York statute authorizing the decision in *Roderigas v. East River Savings Institution*. "The Rhode Island statute undertakes to do directly what the New York statute aims to accomplish by the more indirect method of declaring a judicial decision conclusive against a person not a party to it. In Rhode Island the court does not go through the form of deciding that the person is dead, but, conceding that he is only absent, distributes his estate 'as if he were dead,' without the service of any notice upon him whatever."³

In Massachusetts, the same substantial result is reached by subjecting the question of the relative rights of the parties affected by the administration upon the estate of one supposed to be dead, but afterward appearing in person, to the jurisdiction of a court of equity, with power to validate or avoid any of the acts done.⁴

* Pennsylvania, also, has enacted an efficient and simple [* 462] remedy for the administration of estates of absentees amply securing the interests of such absentee if he should subsequently return, and enabling payment of creditors, and distribution to wife, children, or next of kin, upon just and reasonable conditions.⁵

In Texas, on the other hand, it is provided by statute that a will probated before the death of the testator and administration on the estate of a living person are void, except as to the administration bond.⁶ In Vermont there may be administration on the estate of one who has been absent and unheard from for fifteen years; but if such absentee return, he is nevertheless entitled to all his property, and may recover it from any one having possession of it.⁷ In Arkan-

Statutes allow-
ing such ad-
ministration,
and declaring
it void.

¹ *Burns v. Van Loan*, 29 La. An. 560.

² Pub. St. 1882, p. 476, §§ 8, 9.

³ *Lavin v. The Emigrant Industrial Savings Bank*, 18 Blatchf. 1, 37. The decision of the case was put upon another ground, however. And in the case of *Southwick v. Probate Court*, 18 R. I. 402, this statute was construed, without ques-

tioning its validity; but in *Carr v. Brown* 38 Atl. R. 9, it is held unconstitutional.

⁴ L. Mass. 1873, pp. 684, 685.

⁵ *Brightly's Pard. Dig.*, Supplement 1885, p. 2184.

⁶ Rev. L. 1888, art. 1791.

⁷ St. 1894, § 2387.

sas presumption of death arises after five years' unexplained absence ;¹ but any property administered on in consequence of such presumption may be recovered by such person on his subsequent return, together with rents, profits, and interest.² So, substantially, in New Jersey.³ Probably other States have similar provisions ; but in view of the principle laid down in *Scott v. McNeal*, to wit : that probate courts have no power to administer on the estates of persons living, and that the disposition of the property of living persons by a court without notice to the owner is not due process of law, and therefore a violation of the Fourteenth Amendment to the Constitution of the United States, the validity of any such statute is a matter of grave doubt.⁴

§ 213. **Administration on the Estates of Persons Civilly Dead.** — Civil death, which in England followed attainder of treason or felony, and was anciently the consequence of entering a monastery, abjuring the realm, and banishment, was there attended by the same legal consequences as death of the body. Hence a monk might, on entering religion, make his testament, and appoint executors, and the ordinary might grant administration, as in case of other persons dying ; and such executors and administrators had the same powers as if he were naturally dead.⁵ Thus in Kansas,⁶ Maine,⁷ and Missouri,⁸ the estates of convicts under sentence of imprisonment for life are to be administered as if they were naturally dead ; and in New York the statute provides that a person sentenced to imprisonment for life shall be deemed civilly dead, but this is held not to be a divestiture of a convict's estate,⁹ nor to give the surrogate jurisdiction to grant letters of administration on his estate.¹⁰

But in most of the American States the condition of civil death is not recognized ;¹¹ the constitutions of the several States, as [* 463] well * as the Federal Constitution, abolish attainder and corruption of blood ; and the property of persons sentenced to imprisonment for life does not, generally, descend to the heirs or personal representatives, like that of deceased persons.¹²

¹ Dig. of St. 1894, § 2903. See *Beam v. Copeland*, 54 Ark. 70, referred to *ante*, § 210.

² Dig. of St. 1894, § 231.

³ *Hoyt v. Newbold*, 45 N. J. L. 219, 221.

⁴ *Carr v. Brown*, 38 Atl. 9.

⁵ 1 Bla. Comm. 132.

⁶ Gen. St. 1889, § 5399.

⁷ Rev. St. 1883, ch. 64, § 18.

⁸ Rev. St. 1889, § 7283.

⁹ *Avery v. Everett*, 110 N. Y. 317.

¹⁰ *In re Zeph*, 50 Hun, 523.

¹¹ Chancellor Kent apprehended in *Troop v. Wood*, 4 Johns. Ch. 228, the New York statute to be declaratory of the existing law, enacted for greater caution ; but in *Platner v. Sherwood*, 6 Johns. Ch. 118, he says that he was mistaken in this view, and that strict civil death was never carried further by the common law than to persons professed, abjured, or banished the realm.

¹² *Frazer v. Fulcher*, 17 Ohio, 260 ; *Cannon v. Windsor*, 1 Houst. 143.

* CHAPTER XXIV.

[* 464]

OF THE PROBATE OF THE WILL.

A WILL takes its legal validity from its probate; that is, the certification by the court or tribunal clothed with authority for such purpose that it has been executed, published, and attested as required by law, and that the testator was of sound and disposing mind. Without such proof it is not a will in the legal sense.¹

The will may dispose of real estate, or of personal property, and different proof or a difference in the procedure to obtain the probate may be necessary as to the one or the other; or it may not affect property at all, but only appoint a guardian for a minor and still require probate to give it validity.²

§ 214. **Production of the Will for Probate.**—In many States the judge of probate or register of wills is, by statute, made the custodian of wills deposited with him to that end. In such States, it is his duty, as soon as he receives information of the death of any testator whose will he has in custody, to institute proceedings for the probate thereof, and to that end compel the attendance of the necessary witnesses to prove its execution and the death of the testator.³ If the judge of probate is not the custodian, or, being so, neglects to proceed with the probate, it is the duty of the executor nominated in the will, as well as of any other person who may have it in possession, to produce it for probate. The time fixed by law for such production is different in the different States, varying from the time when the custodian shall learn the testator's death,⁴ to ten days,⁵ fifteen days,⁶ thirty days,⁷ or three months,⁸ after the day on which he died.⁹ Any person interested in a will may demand

¹ See *post*, § 228, as to effect of probate.

² See as to the necessity of proving wills appointing testamentary guardians, Woerner on Guardianship, § 20, p. 58.

³ A statute providing for the *ante mortem* probate of wills was held inoperative in Michigan: *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, 239, 240.

⁴ As in Iowa.

⁵ In Colorado.

⁶ In Pennsylvania.

⁷ In California, Connecticut, Illinois, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, Rhode Island, Texas, Vermont, and Wisconsin.

⁸ In Maryland.

⁹ In other States no provision as to the time within which the production is required exists; but in all of them authority is given to the judge of probate to compel such production by citation to, or attachment against, and, if necessary,

its production and probate;¹ even a slave was allowed a standing in court to compel probate of a will [* 465] bequeathing him his freedom;² and so *an executor, devisee, or purchaser from a devisee, although the estate has been fully distributed.³

Who may demand probate.

In most of the States, the secreting, withholding, or refusal to produce a will for probate, in the possession of an executor or other person, is a violation of the law subjecting such persons to various penalties; they are made liable, for instance, for any damages accruing to any person interested in the will so withheld, in California,⁴ Indiana,⁵ Iowa,⁶ Kansas,⁷ Maine,⁸ Massachusetts,⁹ Nebraska,¹⁰ Nevada,¹¹ Ohio,¹² and Wisconsin;¹³ a fine is imposed in Maryland;¹⁴ and an action given for the use of the estate, or a *qui tam* action against the person withholding the will in Connecticut,¹⁵ Illinois,¹⁶ Maine,¹⁷ Rhode Island,¹⁸ and Vermont.¹⁹ In Mississippi, such withholding is punishable as grand larceny.²⁰ In Texas,²¹ the executor forfeits his right of executorship, if he neglect for more than thirty days to present the will for probate.

Penalties for secreting or withholding will from probate.

In respect of the time within which a will *is allowed* to be proved, there is also considerable divergence in the several States. In New Jersey probate of a will within ten days of the testator's death is erroneous, but good until it be reversed in a direct proceeding.²²

imprisonment of the person having a will in custody. In New York this power was held not to be affected by the statute inhibiting surrogates from exercising any power not expressly conferred: *Brick's Estate*, 15 Abb. Pr. 12.

¹ *Finch v. Finch*, 10 Ga. 362; *Stone v. Huxford*, 8 Blackf. 452; *Stebbins v. Lathrop*, 4 Pick. 33; *Enloe v. Sherrill*, 6 Ired. L. 212, 215; *State v. Pace*, 9 Rich. L. 355; *Ryan v. Tex. & Pac. R. R. Co.*, 64 Tex. 239, 242. "And much liberality must be extended to the petitioner by the judge, in consideration of preliminary questions, because it cannot always be foretold who may be interested, or what the interpretation of the will may be": *Keniston v. Adams*, 80 Me. 290, 293. One not interested cannot bring in a foreign probate for allowance: *Besançon v. Brownson*, 39 Mich. 388, 392.

² *Ford v. Ford*, 7 Humph. 92.

³ Because a will confers no legal title without probate: *State v. Judge*, 17 La. An. 189; *Ryan v. Tex. & Pac. R. R. Co.*, 64 Tex. 239.

⁴ Code Civ. Pr. 1885, § 1298.

⁵ Rev. 1894, § 2752.

⁶ Code, 1888, § 3534.

⁷ Gen. St. 1889, § 7214.

⁸ Rev. St. 1883, ch. 64, § 3.

⁹ Pub. St. 1882, ch. 127, § 13.

¹⁰ Cons. St. 1893, § 1197.

¹¹ St. 1885, § 2673.

¹² Ann. St. 1897, § 5924.

¹³ St. 1889, § 3786.

¹⁴ At the discretion of the court: *Publ. Gen. L.* 1888, art. 93, § 325.

¹⁵ Originally for £5, now for \$20 per month: *Barber v. Eno*, 2 Root, 150.

¹⁶ St. & C. Ann. St. 1895, p. 269, ¶ 2 (\$20 per month).

¹⁷ *Moore v. Smith*, 5 Me. 490.

¹⁸ Pub. St. 1882, p. 473, § 5 (\$100 per month). But under the present statute (*Laws*, 1896, p. 704, § 7) the person withholding the will is liable in damages and may be imprisoned for contempt until he delivers it.

¹⁹ St. 1894, § 2359 (\$10 per month).

²⁰ Code, 1857, p. 434, § 47. See Code, 1880, § 2973; also Ann. Code, 1892, § 1327.

²¹ *Stone v. Brown*, 16 Tex. 425, 428.

²² *Will of Evans*, 29 N. J. Eq. 571.

Limitation of
time within
which probate
may be had.

Perkins, in his American edition of Jarman on Wills,¹ mentions a Georgia statute requiring the registry within three months after the testator's death, otherwise the will to be void; but this statute was held inoperative.² In Ohio, a devise is held to lapse, and the estate devised to descend to the heirs of the testator, if the devisee, knowing of its existence, fail to offer the will, or cause it to be offered for probate within three years.³ In Connecticut * no will is allowed to be [* 466] proved after the expiration of ten years from the testator's death, except in the interest of minors, who have three years after reaching majority within which to obtain the probate.⁴ In Maine,⁵ Oregon,⁶ and Tennessee,⁷ no probate is to be granted after the expiration of twenty years from the testator's death; and in Kentucky the lapse of thirty years is *prima facie* a bar to the establishment of a will in chancery,⁸ and in a recent case it is held that the probating of a will is barred by the ten year Statute of Limitation.⁹ In Indiana,¹⁰ a *bona fide* purchaser from the heirs of the testator can hold against his devisees if the will is not probated within three years; in New York¹¹ and Ohio,¹² if not within four years. In Illinois no time has been designated within which a will may be probated; hence a will was admitted to probate thirteen,¹³ and in Massachusetts sixty-three,¹⁴ years after the testator's death. In North Carolina, also, the Statute of Limitation does not apply to the simple taking of probate; it must be set up, if at all, to the assertion of any rights claimed under the will.¹⁵ In New Jersey the will of a married woman was admitted to probate ten years after her death, her husband's consent thereto being held irrevocable, although the husband had administered the estate until his own death;¹⁶ and in Texas, although probate is required to be made within four years, after the expiration of which no letters testamentary can be granted, a will may be probated thereafter for

¹ Page 218, note 3.

² Harrell v. Hamilton, 6 Ga. 37.

³ Carpenter v. Denoon, 29 Oh. St. 379, 392.

⁴ Goodman v. Russ, 14 Conn. 210, 215.

⁵ Rev. St. ch. 64, § 1. But where the will is fraudulently concealed, the statute does not begin to run until it has been discovered: Deake, Appellant, 80 Me. 50.

⁶ St. 1855, p. 342, § 30.

⁷ Except to infants or married women at the time of the testator's death, as to whom the limitation is thirty years. The probate of a will in the probate court more than thirty years after the death of a testator was held erroneous, but conclusive, Shackelford, J., dissenting, holding it to be void: Townsend v. Townsend, 3 Coldw. 70, 79, 86.

⁸ Hunt v. Hamilton, 9 Dana, 90.

⁹ Allen v. Froman, 96 Ky. 313.

¹⁰ Ann. St. 1894, § 2745; unless devisee is under disability, or the will has been concealed.

¹¹ Unless the will is concealed by the heirs: Bliss' Ann. Code (3d ed., 1890), § 2623.

¹² If the devisee know of its existence and have the same in his power to control: Bates' Ann. St. 1897, § 5349.

¹³ Rebhan v. Mueller, 114 Ill. 343.

¹⁴ Haddock v. Boston & M. R. Co., 146 Mass. 155.

¹⁵ McCormick v. Jernigan, 110 N. C. 406.

¹⁶ Camden Safe D. & T. Co. v. Ingham, 40 N. J. Eq. 3.

the purpose of establishing a link in the chain of title; and where the devisee has assigned his interest under the will before probate, the subsequent probate gives vitality to the conveyance, except against an innocent purchaser from an heir.¹ The statute also makes an exception when the proponent has not been in default in failing to present the will for probate within the four years;² and letters so granted cannot be attacked collaterally.³ In Michigan a legatee, holding a will or having knowledge of its existence, must secure its probate within a reasonable time after he knows of the testator's death, or he may bar himself from claiming any benefit therefrom.⁴

[* 467] * § 215. **Validity of Probate in Probate Courts.** — Previous

to the act creating the Court of Probates,⁵ no will or testamentary paper whatever relating to personality could be established or disputed in any other than the ecclesiastical or prescriptive manorial courts of England; these courts, however, had no jurisdiction over wills affecting real estate, — their sentences and decrees were wholly inoperative as to such.⁶ Under the act referred to, jurisdiction to take probate of wills, without distinguishing between them on the ground of their disposing of real or personal property, is vested in the Court of Probate thereby created. The probate may be in the "common" or "non-contentious" form, granted by the registrar upon the affidavit of the applicant showing the testator's domicil and death; or it may be in the "solemn" or "contentious" form, upon citation to the widow and next of kin, and a regular trial by the judge.⁷ This power had long before been exercised by the probate courts of nearly all the States; the distinction between wills of realty and of personality is now practically ignored in the proceedings to obtain probate,⁸ except, perhaps, in Maryland and District of Columbia, where a will of personality may be admitted to probate in the Orphan's Court, and on the testimony of one of the attesting witnesses, while a will of real estate must be proved by the testimony of all of them.⁹ In some of the States, however, there is still a distinction observed as to the conclusiveness of

At common-law wills of personality received probate in ecclesiastical courts only; wills of realty, in common-law courts only.

Statutory jurisdiction now in probate courts as to both.

¹ *Ryan v. Tex. & Pac. R. R. Co.*, 64 Tex. 239, 241; *Ochoa v. Miller*, 59 Tex. 460.

² *Heist v. Convention*, 76 Tex. 514, 519.

³ *Henry v. Roe*, 83 Tex. 446.

⁴ *Foote v. Foote*, 61 Mich. 181, 194.

⁵ 20 & 21 Vict. c. 77, § 13.

⁶ "Whenever a freehold is claimed, the original will must be produced. . . . And such is the jealousy of the common law with regard to ecclesiastical jurisdiction, that neither an exemplification under the great seal, nor the probate under

the seal of the Ecclesiastical Court, will be admitted as secondary evidence": *Adams on Eject.* *290 (4th ed.), citing *Ash v. Calvert*, 2 Camp. 387, 389.

⁷ *Wms. Ex.* [290].

⁸ *Schoul. Ex.* § 59, citing *Shumway v. Holbrook*, 1 Pick. 114; *Wilkinson v. Leland*, 2 Pet. 627, 655; *Bailey v. Bailey*, 8 Ohio, 239, 245.

⁹ *Robertson v. Pickrell*, 109 U. S. 608, 610; *Campbell v. Porter*, 162 U. S. 478, 486.

Different
methods of
probate.

such probate.¹ But the distinction between the several methods of probate, variously designated as the "common" contrasted with the "solemn" form, the "non-contentious" with the "contentious," or the "*ex parte*" probate with the probate "*per testes*," exists in many of them, requiring different forms of proceeding in bringing about the same result secured by * the English statute. Courts of pro- [* 468]bate have original exclusive jurisdiction in all of the States to take probate of wills in the common form, where there is no notice to any of the parties, or if parties are cited or notified by publication, they either fail to appear, or, appearing, make no objection. In some instances the same class of courts has also jurisdiction to cite parties in interest, either upon demand of the executor or other person propounding the will, or upon objections being made or caveat filed, and in such case grant probate in solemn form, which then is conclusive.

Thus in California,² Delaware,³ Florida,⁴ Georgia,⁵ Maryland,⁶ Mississippi,⁷ Nevada, Nebraska, New Jersey,⁸ New Hampshire,⁹ and

¹ See as to effect of probate, *infra*, § 228.

² Code Civ. Pr. §§ 1298-1333. Parties having no notice of the probate may contest within one year; and the decision on such contest, as well as the original probate if not contested within one year, is conclusive. If the heirs appear, although not properly served with notice, they are bound: *Abila v. Padilla*, 14 Cal. 103. Such decision is not assailable if not appealed from: *State v. McGlynn*, 20 Cal. 233; see *McCrea v. Haraszthy*, 51 Cal. 146.

³ Rev. Code, 1874, p. 539; *Davis v. Rogers*, 1 Houst. 183.

⁴ The will may be proved on the affidavit of the executor or other proponent; any party interested may contest within seven years: *Meyer v. Meyer*, 7 Fla. 292.

⁵ Probate by one witness without notice to any one is conclusive, if it remains unchallenged for seven years (except as to minors, who may interpose caveat for four years after their majority); probate in solemn form by all witnesses upon notice to all parties: Code, 1882, §§ 2423-2426. Notice to the husband of one next of kin is not sufficient: *Stone v. Green*, 30 Ga. 340; if one of the caveators die, his representative need not be made a party: *Stancil v. Kenan*, 35 Ga. 102; destruction

of the subject of a legacy is no ground for a caveat: *Newsom v. Tucker*, 36 Ga. 71, 76.

⁶ Upon caveat by any person in interest, there must be a trial; issues are made up and sent by the orphan's court to the circuit court from which appeal lies to the court of appeals: *Jameson v. Hall*, 37 Md. 221, 230; *Schull v. Murray*, 32 Md. 9, 15. Where there is a dispute in regard to the facts, it is incumbent on the court to order a plenary proceeding: *Mills v. Humes*, 22 Md. 346, 351, citing numerous earlier cases. The probate of a will of personalty by the probate court is conclusive, of realty only *prima facie*; but a rejection is conclusive in both classes of wills: *Johns v. Hodges*, 62 Md. 525, 533. The decision of the orphan's court is final and conclusive on all the world: *McDaniel v. McDaniel*, 86 Md. 623. Since the act of 1894, no will is subject to caveat or other objection to its validity, after three years from probate: *Garrison v. Hill*, 81 Md. 551, holding the act not retroactive.

⁷ The issue of *devisavit vel non* is sent for trial to the circuit court and the verdict certified to the probate court: *Graves v. Edwards*, 32 Miss. 305.

⁸ Proceedings in this State are the demanded within one year: *Stewart v. Harriman*, 56 N. H. 25.

⁹ The probate in common form may be appealed from, or proof in solemn form

[* 469] South Carolina,¹ the probate in common form may be * contested within a limited time, and probate in solemn form, with notice to all interested parties, had in the probate courts. In Alabama,² Colorado,³ Illinois,⁴ Indiana,⁵ Kansas,⁶ Kentucky,⁷ Missouri,⁸

same as in Maryland: on objections before the surrogate, trial is had in the orphan's court, whence issues may be sent to the circuit court; a probate without notice will be set aside by the ordinary: Will of Lawrence, 7 N. J. Eq. 215, 221.

¹ Probate in common form, by one witness, *ex parte*, is conclusive, unless probate in full form be demanded within four years after removal of any disability, whereupon trial is upon notice to all parties and examination of all the witnesses: Kinard v. Riddlehoover, 3 Rich. L. 258, 266.

² Probate without notice to the next of kin or widow may be set aside in chancery within five years: Hall v. Hall, 47 Ala. 290; although it is the duty of the probate court to set aside a probate granted without notice to the heirs, upon petition by such heirs: Sowell v. Sowell, 40 Ala. 243. Notice to the widow and next of kin is required in all cases; but one who does not contest in the probate court, though he testify for others contesting, may contest by bill in chancery at any time in five years: Knox v. Paull, 95 Ala. 505, in which Walker, J., remarks that "the attempt to trace resemblance between the methods of proving and contesting wills under the statute and the system which it superseded, suggests certain analogies which are apt to mislead, as the proceedings under the two systems are widely dissimilar in important particulars."

³ Probate may be contested by parties not notified and not appearing, in chancery, within two years; or the probate may be appealed from: Gen. L. 1883, §§ 3508, 3510.

⁴ Within three years, in chancery; or three years after removal of disability; and parties may also contest in the probate court: Duncan v. Duncan, 23 Ill. 364, 366; and appeal from it: Doran v. Mullen, 78 Ill. 342; Storey's Will, 20 Ill. App. 183; s. c. 120 Ill. 244. The saving clause in favor of persons absent from the State applies only to persons temporarily absent, not to non-residents in general:

Wheeler v. Wheeler, 134 Ill. 522, citing cases *pro* and *con* in various States. The three years within which a contest may be filed is not so much a statute of limitations as a mere grant of jurisdiction within that time: Sinnett v. Bowman, 151 Ill. 146.

⁵ By parties not present or notified, within three years, or two years after removal of disability, in the circuit court: Etter v. Armstrong, 46 Ind. 197; Deig v. Morehead, 110 Ind. 451. There is a right to trial by jury: Lamb v. Lamb, 105 Ind. 456.

⁶ Within two years after removal of disability, by civil action.

⁷ Within five years in circuit court; or by persons not present or notified in chancery within three years, on the general doctrine that a person bound by a judgment who was not present or notified may have the judgment reviewed: Singleton v. Singleton, 8 B. Mon. 340, 358, *et seq.*, reviewing numerous earlier cases; or by writ of error in circuit court: Tibbats v. Berry, 10 B. Mon. 473, 476; or appeal: Walters v. Ratliff, 5 Bush, 575, citing Hughey v. Sidwell, 18 B. Mon. 259.

⁸ Probate or rejection *ex parte* by the probate court is binding, and there is no appeal; but any person interested may within five years institute proceedings in the circuit court for the trial of an issue of *devisavit vel non*: Kenrick v. Cole, 46 Mo. 85; Duty's Estate, 27 Mo. 43. The probate is a judicial act, and the act of the clerk admitting the will to probate in vacation is a mere conditional act and of no effect unless confirmed by the court: Snuffer v. Howerton, 124 Mo. 637. The proceeding in the circuit court contesting the will is *in rem*, and a non-suit cannot be taken; the will must be either established or rejected: McMahon v. McMahon, 100 Mo. 97. It is an action at law, though in some respects partaking of a proceeding in equity: Garland v. Smith, 127 Mo. 567, 580; and is in the nature of an appeal and a trial *de novo* in the circuit court: Norton v. Paxton, 110 Mo. 456, 461, and cases referred to. See also *post*, § 227, on contest of wills.

New York,¹ North Carolina,² Ohio,³ Pennsylvania,⁴ Tennessee,⁵ Texas,⁶ Virginia,⁷ and West Virginia,⁸ the probate originally obtained *ex parte*, or in common form, in the probate court, may be contested either in chancery, or by action in a court of law; and the proceedings in such court constitute *the [* 470] probate in solemn or full form, or, as is sometimes said, *per testes*.

¹ Probate by the surrogate is conclusive as to personalty, *prima facie* as to realty; he cannot grant probate in solemn form: *Wetmore v. Parker*, 52 N. Y. 450, 456; *Burger v. Hill*, 1 Bradf. 360, 371. Rejection of the will is conclusive as to personalty, but not even presumptive evidence as to realty: *Corley v. McElmeel*, 149 N. Y. 228 (Bartlett, J., dissenting on the latter point); see also *Anderson v. Anderson*, 112 N. Y. 104, 113; *Merriam's Will*, 136 N. Y. 58. The same evidence is required as to the genuineness of the will and testator's capacity in the case of a will of realty as of personalty; and if the question is properly raised by one interested in some capacity the surrogate should admit or refuse probate of the instrument as a whole: *Matter of Bartholick*, 141 N. Y. 166.

² Upon caveat, at any time, proceedings will be removed into the superior court. As to the effect of a caveat on the powers of an executor and further proceedings under the will, see *Palmer's Will*, 117 N. C. 133; *Randolph v. Hughes*, 89 N. C. 428.

³ Contest may be made in the circuit court within two years: *Hathaway's Will*, 4 Oh. St. 383. See *McArthur v. Scott*, 113 U. S. 340, 385, *et seq.*, reviewing the Ohio cases, and holding that, on a contest in chancery, the decree only affects parties to the suit, being void as to all others. But if the proper parties are before the court, if a bill to contest is seasonably filed by an infant heir, who is within the saving clause of the statute, the proper decree is to annul the whole order of probate: *Ib.*, p. 387; *Powell v. Koehler*, 52 Ohio St. 103. *Post*, § 227, p. *500. The rejection of a will in the probate court, unappealed from, is not in this State conclusive; but it may be offered again for probate by any other party interested therein: *Foucher v. Keyl*, 48 Oh. St. 357 (*Minshall, J.*, dissenting, p. 70); and

probably this rule would apply even where on appeal the common pleas had refused probate; but it is conclusive on the proponent; "as the action of the probate court is final as to all persons where the will is admitted to probate, so it is equally final and binding as to all persons having due notice where probate is denied": *Missionary Soc. v. Ely*, 56 Ohio St. 405, 410.

⁴ Upon caveat, issues must be tried in the orphan's court or common pleas court; probate is conclusive as to personalty, but may be contested as to real estate by caveat and action at law; if not contested within five years, it is conclusive also: *Wikoff's Appeal*, 15 Pa. St. 281; *Cauffmann v. Long*, 82 Pa. St. 72; *Broe v. Boyle*, 108 Pa. St. 76, 82.

⁵ Proof by one witness; but on contest at any time within eighteen years, there must be full trial in the circuit court: *Gibson v. Lane*, 9 Yerg. 475; *Edmondson v. Carroll*, 2 Sneed, 678; *Miller v. Miller*, 5 Heisk. 723.

⁶ The probate may be contested within four years after removal of disability or discovery of fraud, in the circuit court.

⁷ Probate is conclusive upon all parties notified or appearing; but if not, they may impeach the probate in equity within five years: *Spencer v. Moore*, 4 Call, 423. The jurisdiction of the chancery court on a bill filed to impeach or establish a will is merely that of a court of probate, and confined to the exercise of the special and limited powers conferred upon it by the statute; hence it cannot make any orders respecting the estate, and a decree appointing a receiver to rent out the estate devised *pendente lite*, is void: *Kirby v. Kirby*, 84 Va. 627.

⁸ Appeal is given within one year to circuit court, and review in chancery within three years.

In the States of Arkansas,¹ Iowa,² Maine, Massachusetts,³ Michigan,⁴ Minnesota, Oregon,⁵ Rhode Island, Vermont, and Wisconsin,⁶ the probate obtained in the probate court seems to have all the force and validity of a probate in solemn form, and is conclusive, both as to real and personal estate, if not appealed from or annulled in equity for fraud, or some cause which gives equity courts jurisdiction over judgments at law.⁷

In Louisiana the will must be proved before the parish or district judge;⁸ a foreign will may be registered, or proved before the court in which it is offered as evidence.⁹

The rules and effect of contest of wills are further considered in connection with the revocation of probate.¹⁰

The probate of wills lost, suppressed, or destroyed¹¹ is ordinarily within the jurisdiction of probate courts, as coming within the scope of their general jurisdiction.¹² But in most of the United States chancery courts exercise the power to establish wills on the ground that they have been lost, suppressed, or destroyed, and the jurisdiction in such cases seems to be concurrent,¹³ unless the statute restrict the jurisdiction of the one or other of these courts. Thus, it is held in Tennessee, that where a will has been lost, or destroyed, or suppressed, by acci-

Jurisdiction over probate of lost, suppressed, or destroyed wills.

¹ Dowell v. Tucker, 46 Ark. 438, 449. The probate court can admit the will to probate in common form, or cause all parties interested to be summoned; in case of error it must be corrected by appeal and not certiorari: Petty v. Ducker, 51 Ark. 281, 284; any party in interest may make himself a party by perfecting an appeal from the *ex parte* probate in common form: Ouchita v. Scott, 64 Ark. 349.

² Proceedings in Iowa are in the circuit court: Code, § 2312; Murphy v. Black, 41 Iowa, 488; Gilruth v. Gilruth, 40 Iowa, 346; a proceeding to probate is not reviewable *de novo* on appeal: Donnelly's Will, 68 Iowa, 126.

³ Bonnemort v. Gill, 167 Mass. 338, holding the decree of probate to be in the nature of a proceeding *in rem*, to which all persons in interest may make themselves parties, but are forever bound by the decree whether they are in fact parties, or not: p. 340; Parker v. Parker, 11 Cush. 519.

⁴ In this State the statute requires the probate judge, in case there are foreign heirs, to notify the consul of the nation

where they reside, by letter, of the application for probate; this notice is held to be for the sole benefit of such foreign heirs, not to be invoked by any other party, and is not essential to give the court jurisdiction, the probate being a proceeding *in rem*: Rice v. Hosking, 105 Mich. 303.

⁵ See Richardson v. Green, 61 Fed. (C. C. A.) 423, 426, 429, and cases cited. After the will has received probate in the common form, it can be attacked by a direct proceeding between parties.

⁶ O'Dell v. Rogers, 44 Wis. 136.

⁷ Schoul. Ex. § 70, citing Smith Prob. Pr. 46.

⁸ Voorh. Civ. Code, 1889, art. 1644. Succession of Eubanks, 9 La. An. 147; Hollingshead v. Sturges, 16 La. An. 334.

⁹ Voorh. Civ. Code, art. 1688.

¹⁰ Post, § 227.

¹¹ As to which see post, § 221.

¹² Dower v. Seeds, 28 W. Va. 113, 152, and numerous cases cited.

¹³ Dower v. Seeds, *supra*; Harris v. Tisereau, 52 Ga. 153; Missionary Soc. v. Eells, 68 Vt. 497; see also Hall v. Gilbert, 31 Wis. 691.

dent or fraud, it can only be set up in a court of chancery;¹ in Ohio, California, and Vermont, that the jurisdiction is confined to a court of probate;² and the Supreme Court of the United States expressed grave doubt whether such is the law of Louisiana.³

§ 216. **Method of Proof in Common Form.**—The probate of a will in common form is in its nature *ex parte*, without notice to any one interested in or against it, and resting, in some States, upon the evidence or affidavit of a single witness, which in some instances may be the executor

Ex parte or non-contentious probate.

* or proponent himself. It "applies only for con- [* 471]

venience, expedition, and the saving of expense, where there is apparently no question among the parties interested in the estate that the paper propounded is the genuine last will and as such entitled to probate. For contentious business before the court, probate in common form would be quite unsuitable."⁴ According to the English ecclesiastical practice, in which this form of probate originated, a will is proved when the executor presents it before the judge and produces more or less proof that the testament presented is the true, whole, and last testament of the deceased, whereupon the judge passes the instrument to probate, and issues letters testamentary under the official seal.⁵ Under the Court of Probate Act the executor may at his pleasure prove the will in common or in solemn form, the difference in effect being that the probate in common form may be impeached at any time within thirty years by a person having an interest, whereupon the executor will be compelled to prove it *per testes* in solemn form;⁶ whereas, if once proved in solemn form of law, the executor is not to be compelled to prove the same any more, and the instrument remains in force, although all the witnesses be dead.⁷

Effect of probate in common and in solemn form in England.

¹ Buchanan v. Matlock, 8 Humph. 390, 400.

² Morningstar v. Selby, 15 Ohio, 345, 362; McDaniel v. Pattison, 98 Cal. 86, 94 (denying jurisdiction in chancery to establish a will lost or fraudulently suppressed, even as incidental to relief against the spoliator), 102; Missionary Society v. Eells, *supra* (holding that chancery cannot draw to itself jurisdiction by granting some other equitable aid, but may supplement any shortage in the powers of the probate court by affording collateral equitable relief).

³ Gains v. Chew, 2 How. (U. S.) 619, 647. This *dictum* as to the inherent power of equity in such case was afterwards criticised as being *obiter* and without the "support of any well-considered cases": Broderick's Will, 21 Wall. 503, p. 514.

⁴ Schoul. Ex. § 66. But in some States, for instance, in Missouri, there can be no contentious proceeding until the will has been either admitted or rejected by the probate court, which can only be in the common form: Rev. St. 1889, §§ 8880, 8888.

⁵ Schoul. Ex. § 66, citing Swinb., pt. 6, § 14, pl. 1; Wms. Ex. [325].

⁶ So the probate of a codicil, granted in common form in 1808, was upon citation of the executor by the next of kin to prove it *per testes* in due form of law, revoked in 1818: Wms., citing Satterthwaite v. Satterthwaite, 3 Phillim. 1; and one granted in 1807 was revoked in 1820: Finneane v. Gayfere, 3 Phillim. 405.

⁷ Wms. Ex. [334], citing Swinb., pt. 6 § 14, pl. 4.

According to the practice in American probate courts, a similar course is pursued in most of the States; usually, the executor (but it may be any other person having an interest) presents the will, and sets forth in a petition (which may be a printed blank provided for such purpose) the facts of the death of the testator, his last domicile, the names and places of residence of the surviving widow or husband, if there be such, and of the next of kin; and alleging that the paper or papers presented constitute the last will of the deceased, prays for the probate thereof and for appointment of executor or administrator, as the case may be.¹ It is held in some of the States,

Proof in common form under American statutes.

[* 472] as has *already been mentioned, that proof may be made by a single subscribing witness;² but in most of them the testimony of both or all subscribing witnesses is required, if they are living and within the reach of the process of the court.³

Whether the will be proved by the testimony of one or all of the witnesses, or by the affidavit of the executor, or by other witnesses, the facts necessary to be proved are in all instances the same; that the testator was of sound mind, and that he and the subscribing witnesses complied with all the requirements of the statute respecting the execution and attestation by the requisite number of witnesses.⁴ The essential qualities of a will have been considered in a former chapter of this work, to which reference is hereby made.⁵

What facts must be proved to obtain probate.

¹ Schoul. Ex. § 65. It is not essential that the petition allege the testamentary capacity of the testator: *Hathaway's Appeal*, 46 Mich. 326, 328.

² So provided by statute in California: Code Civ. Pr. § 1308; Massachusetts: Pub. St. 754, § 1; Michigan: Howell's St. § 5802; Nevada: Gen. St. 1885, § 2685; and held in Iowa: *Barney v. Chittenden*, 2 Green (Iowa), 165, 176; and Tennessee: *Rogers v. Winton*, 2 Humph. 178; but in a later case it was held that there must be two witnesses to prove a will of personalty in Tennessee, who need not, however, be subscribing witnesses: *Johnson v. Fry*, 1 Coldw. 101. The statutes of Florida, Georgia (*Brown v. Anderson*, 13 Ga. 171), South Carolina, and Tennessee (Code, 1884, § 3012) contain similar provisions.

³ *Doran v. Mullen*, 78 Ill. 342, 344; *Lindsay v. McCormack*, 2 A. K. Marsh. 229; *Martin v. Perkins*, 56 Miss. 204, 209; *Butler v. Benson*, 1 Barb. 526, 533; *Armstrong v. Baker*, 9 Ired. 109; *Fry's Will*,

2 R. I. 88, 90; *Clarke v. Dunnivant*, 10 Leigh, 13, 23; *Staring v. Bowen*, 6 Barb. 109, 113. But it is not essential that the subscribing witnesses shall each testify to all of the essential facts: *Tilden v. Tilden*, 13 Gray, 110; *Weir v. Fitzgerald*, 2 Bradf. 42. See *post*, § 218, on the effect of want of memory of subscribing witnesses.

⁴ *Moore v. Steele*, 10 Humph. 562; *Johnson v. Dunn*, 6 Gratt. 625. The handwriting of a testator who signed by making a mark cannot be proved: *Walsh's Will*, 1 Tuck. 132; *Matter of Reynolds*, 4 Dem. 68; except by one who saw him affix the mark: *Matter of Dockstader*, 6 Dem. 106; and even though such witness be the only subscribing witness; *Matter of Kane*, 2 Connoly, 249, 258; and where the witnesses seemed to remember the circumstances with essential accuracy, the want of testamentary declaration was held fatal: *Wilson v. Hetterick*, 2 Bradf. 427.

⁵ *Ante*, §§ 36 *et seq.*

§ 217. **The Probate in Solemn Form.**—The English distinction between the common or *ex parte* probate and the probate in solemn form, or *per testes*, has already been mentioned.¹ In some of the

Proof in solemn form requires notice, and trial of an issue of *devisavit vel non*.

American States,² the only method of probate provided for is the original proceeding in the probate court, which, as it requires citation or notice to all the parties interested and a regular trial of the issue of *devisavit vel non*, with trial by jury under the direction of a judge, is substantially a proceeding in solemn form.³ In others, how-

ever, the proceeding in solemn form is materially different from *that primarily resorted to in the probate court, and [*473] may in some instances be had in the probate court also, but must in others be pursued in common-law or chancery courts.⁴ The chief distinction here, as in England, is the necessity of notice or summons to all the parties in interest in the plenary proceeding,⁵

All attesting witnesses required.

while the other is generally *ex parte*. Another rule is, that upon a contest, or caveat, where probate in solemn form is required, all the attesting witnesses competent to testify, and within the reach of the process of the

court, must be examined.⁶ But this rule is not a universal one; there are cases in some of the States in which, on proceedings at law for the probate of a will, the testimony of one or two subscribing witnesses out of a greater number was held sufficient to establish it without calling or examining them all;⁷ in others that the testimony of one subscribing witness, and facts and circumstances equal to that of another, are sufficient.⁸ But on a contest or proof in solemn form, all persons interested in the will, as well as all persons who would in the absence of a will be entitled to inherit, must be made parties by publication or service of notice;⁹ unless they appear.¹⁰ In Michigan

¹ *Ante*, § 215.

² *Ib.*

³ Schoul. Ex. § 70.

⁴ *Ante*, § 215.

⁵ "In proceedings of this nature, . . . the judge of probate having given that public notice which the law requires, the mere fact that some of the heirs are infants, idiots, or insane will not defeat the probate of the will": Dewey, J., in *Parker v. Parker*, 11 Cush. 519, 524. Where the statute prescribes no form of notice for the parties to pursue, the sufficiency of notice is left in the discretion of the judge: *Marcy v. Marcy*, 6 Met. (Mass.) 360, 367. The proceeding is *in rem*, and therefore none of the parties can dismiss the proceeding, or take a non-suit: *post*, § 227, p. * 500.

⁶ *Brown v. Anderson*, 13 Ga. 171, 177; *Withinton v. Withinton*, 7 Mo. 589; *Chase v. Lincoln*, 3 Mass. 236; *Burwell v. Corbitt*, 1 Rand. 131, 141; *Bailey v. Stiles*, 2 N. J. Eq. 220, 232; *Rash v. Purnell*, 2 Harring. 448, 449.

⁷ *Hall v. Sims*, 2 J. J. Marsh. 509, 511; *Jackson v. Vickory*, 1 Wend. 406, 412; *Walker v. Hunter*, 17 Ga. 364, 410, *et seq.*; *McKeen v. Frost*, 46 Me. 239, 244.

⁸ *Suggett v. Kitchell*, 6 Yerg. 425; *Loomis v. Kellogg*, 17 Pa. St. 60, 63; *Moore v. Steele*, 10 Humph. 562, 565; *Bowling v. Bowling*, 8 Ala. 538; *Nalle v. Fenwick*, 4 Rand. 585, 588.

⁹ *Crew v. Pratt*, 119 Cal. 139, 153; as to the rules relating to the contest of wills, see *post*, § 227.

¹⁰ *Crew v. Pratt*, *supra*.

it is intimated, contrary to the English rule, that all the subscribing witnesses need not be called, except inferentially in the probate court.¹ The age of the instrument to be proved is held to be an important element to be considered in connection with the sufficiency of the proof to establish it; a will forty years old may be proved by testimony which would be insufficient to prove one of recent date.² And it is not essential that each one of the witnesses shall be able to testify to all the formalities required for the execution and attestation of the will.³ So it is held in Illinois, that the subscribing witnesses must declare that the testator was, in their belief, of sound mind and memory, but this may be stated in [*474] *equivalent words; it is not essential that the statutory formula shall be adhered to.⁴

§ 218. **Proof when the Testimony of Subscribing Witnesses cannot be obtained.** — It appears from the discussion of the subject of the attestation of wills in a former chapter,⁵ that the competency of attesting witnesses generally required by the statute refers to the time of attestation; for it may happen that a witness has become incompetent after the execution of a will, but before the death of the testator. And it was there also shown that the statute of Geo. II. c. 6, which provides that interest in the probate of a will does not disqualify an attesting witness, but that the act of attestation disqualifies the witness from taking any benefit under the will, has been substantially enacted in most of the States.⁶ It is self-evidently indispensable to admit *aliunde* evidence to prove the will, if any one or more of the attesting witnesses are dead, insane, or cannot, for any reason, be compelled or permitted to testify on the probate thereof. Thus where one of the attesting witnesses is probate judge, the will may be proved by the other witnesses;⁷ where any of them are dead, insane, or incompetent to testify, or where their place of residence or whereabouts is unknown, so that their testimony cannot be obtained, proof may be made of their handwriting, and of the handwriting of the testator, and the will admitted to probate upon such proof.⁸ But in order to make such testimony admissible, it must be shown that it is impossible to obtain that of the subscribing witnesses,

Aliunde testimony admissible if that of subscribing witnesses is not attainable.

¹ Abbott v. Abbott, 41 Mich. 540, 543.

² Welty v. Welty, 8 Md. 15, 21, citing Lovell on Wills, 418; 23 Law Libr. (Wharton's ed.) 1839, p. 223; Jackson v. Le Grange, 19 Johns. 386, 389.

³ Jauncey v. Thorne, 2 Barb. Ch. 40, 53.

⁴ Bice v. Hall, 120 Ill. 597, 600; Yoe v. McCord, 74 Ill. 33.

⁵ Ante, § 41, p. *72.

⁶ Ante, § 41, p. *73.

⁷ Patten v. Tallman, 27 Me. 17, 27; in some instances the statutes provide for probate before another officer in such case: Gen. St. Col 1883, § 3504; Rev. St. Ill. 1885, p. 2469, § 5.

⁸ Miller v. Carothers, 6 Serg. & R. 215, 222; Hopkins v. De Graffenreid, 2 Bay, 187, 192, Pollock v. Glassell, 2 Gratt. 439, 460; Snider v. Burks, 84 Ala. 53, 56; Robinson v. Brewster, 140 Ill. 649.

either by taking their depositions, as is provided for in some States in case of attesting witnesses being beyond the reach of the process of the court, or by securing their personal attendance.¹ Where the statute does not authorize the taking of the depositions of subscribing witnesses, secondary evidence is admissible, upon proof of their being beyond * reach of process of the court in [* 475] which proceedings are pending.² In all such

Absence of
subscribing
witnesses must
be accounted
for.

cases the absence of the witnesses must be satisfactorily accounted for, after proof of such diligence in the search for them and endeavor to obtain their testimony as is required ordinarily before evidence of a secondary nature is admitted.³

For the same reason the validity of a will cannot be permitted to rest upon the veracity or memory of the attesting witnesses: to do so would be subversive of justice and destructive of the rights of the testator as well as of the beneficiaries under the will. Hence a will may be established although some or all of the subscribing witnesses fail to remember the essential facts to be proved,⁴ or where their testimony, biased by prejudice, interest, or ill will, negatived such facts.⁵ It is held that where there is a failure of recollection by

Probate in
default of or
against the
testimony of
subscribing
witnesses.

¹ *Graber v. Haaz*, 2 Dem. 216; *Stow v. Stow*, 1 Redf. 305. In Illinois, on appeal from the probate court, from an order admitting a will to probate, the evidence is confined to the subscribing witnesses: *Noble's Will*, 124 Ill. 266. In Mississippi it is held that, on the *ex parte* exhibition of a will, the subscribing witnesses must be examined, and are the only competent witnesses to prove the signing, publication, and attestation; but other witnesses may prove the sanity: *Martin v. Perkins*, 56 Miss. 204, 209. In the absence of statutory provision it is held that the proponent need not obtain the deposition of an attesting witness not within reach of process: *Denney v. Pinney*, 60 Vt. 524.

² *Bowling v. Bowling*, 8 Ala. 538; *Bethell v. Moore*, 2 Dev. & B. L. 311. *Engles v. Brington*, 4 Yeates, 345.

³ *Stow v. Stow*, 1 Redf. 305; *Perkins's Jarm. on Wills*, 219. Thus, where one voluntarily, without mistake or accident, destroyed a will, he would not be permitted to prove it by secondary evidence: *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401. See, as to diligence required in search for subscribing witnesses, 1 *Greenl. Ev.* § 574; *Hodnett v. Smith*, 2 *Sweeney*, 401.

⁴ *McKee v. White*, 50 Pa. St. 354, 359; *Hopf v. State*, 72 Tex. 281, 285; *Marton v. Heidorn*, 135 Mo. 608 (in contentious proceeding). "Want of memory will no more destroy the attestation than insanity, absence, or death; . . . memory can no more be kept alive than the body, and hence the law allows the attesting signature to speak, when the tongue may be silent; and it attests that everything was rightly done unless the act attested be impeached, not negatively merely, but positively": *Kirk v. Carr*, 54 Pa. St. 285, 290; *Newhouse v. Godwin*, 17 Barb. 236, 255; *Beadles v. Alexander*, 9 Baxt. 604; *Allaire v. Allaire*, 37 N. J. L. 312, 325; *O'Hogan's Will*, 73 Wis. 78.

⁵ *Lamberts v. Cooper*, 29 Gratt. 61, 68; *Pollock v. Glassell*, 2 Gratt. 439, 462, citing numerous English cases; *Vernon v. Kirk*, 30 Pa. St. 218; *Howell's Will*, 5 T. B. Mon. 199, 203; *Peebles v. Case*, 2 Bradf. 226, 240; *Will of Jenkins*, 43 Wis. 610, 612; *Loughney v. Loughney*, 87 Wis. 92; *Barnewall v. Murrell*, 108 Ala. 366, 381; *Abbott v. Abbott*, 41 Mich. 540, 542; *Conselyea v. Walker*, 2 Dem. 117, 121; *Mays v. Mays*, 114 Mo. 536, 541.

the subscribing witnesses, the probate of the will cannot be defeated if the attestation clause and the surrounding circumstances satisfactorily establish its execution.¹

Importance of attestation clause.

The testimony of an attesting witness invalidating a will ought to be viewed with suspicion,² because such person by his [* 476] act of attestation solemnly testifies to the sanity of the * testator;³ it was said that no fact stated by such a witness can be relied on when he is not corroborated by other witnesses.⁴ But of whatever effect the recitals in the attestation clause may be where the witness fails to remember what occurred, they are not sufficient to outweigh his positive statements in contradiction thereof.⁵

§ 219. **Witnesses Disqualified by Interest.**—The competency of attesting witnesses, to what extent and in what States an interest in the will disqualifies them, and how and when their competency may be restored, as well as the effect of the testimony of such witnesses upon a devise or legacy to them, has been discussed in a former chapter in connection with the attestation of wills.⁶ But one who is not an attesting or subscribing witness may also be incompetent, by reason of interest in the probate, to testify. Thus, it was held in Alabama that the proponent, being interested in the question of costs, was incompetent to testify in support of the will;⁷ and in New Jersey, that an executor was disqualified because of the commissions to which he would be entitled.⁸ This subject is determined by the law of each State in defining the competency of witnesses in ordinary cases. The rule which excluded witnesses on account of their interest has been greatly relaxed in most of the States; and it seems now that one

Disqualification of other witnesses by interest.

¹ *Rugg v. Rugg*, 83 N. Y. 592, 594, citing *Matter of Kellum*, 52 N. Y. 517, and *Trustees v. Calhoun*, 25 N. Y. 422, 425; *Will of Pepoon*, 91 N. Y. 255, 258; *Matter of Nelson*, 141 N. Y. 152; *Allaire v. Allaire*, 37 N. J. L. 312; *Brown v. Clark*, 77 N. Y. 369; 1 Am. Pr. R. 510, and cases cited, p. 517 *et seq.*

² *Lamberts v. Cooper*, 29 Gratt. 61, 68. As to the importance of reciting all the formalities required in the execution and attestation of a will in the attestation clause, see *ante*, § 40, and *supra*, note 4.

³ *Webb v. Dye*, 18 W. Va. 376, 388; *Young v. Barner*, 27 Gratt. 96, 103.

⁴ *Staples, J., in Cheatham v. Hatcher*, 30 Gratt. 56, 64, citing *Kinleside v. Harrison*, 2 Phillim. 449.

⁵ *Burke v. Nolan*, 1 Dem. 436, 442;

Lewis v. Lewis, 11 N. Y. 220, 224, citing English and American cases; *Orser v. Orser*, 24 N. Y. 51, 54; *Darnell v. Busby*, 50 N. J. Eq. 725, 732; *Barr v. Graybill*, 13 Pa. St. 396, 399, distinguishing between the want of memory by the witness and affirmative testimony showing the omission of some essential requisite to the validity of the will. See also *Tucker v. Sandidge*, 85 Va. 546, 571.

⁶ *Ante*, § 41.

⁷ *Gilbert v. Gilbert*, 22 Ala. 529, 532. But it is now held that the proponent, who is a party and interested as a legatee, is a competent witness under the statute to prove the execution: *Snider v. Burks*, 84 Ala. 53, 56.

⁸ *Snedekers v. Allen*, 2 N. J. L. 35, 38.

who would be competent to testify in an action between himself and the parties interested in the probate of the will is competent to give evidence for or against it.¹ In Maine, it is held that the provision of the statute which excepts executors, administrators, and heirs of a deceased person from the operation of the general law providing that no one shall be excused or excluded from testifying on the ground of interest in the event of the suit, as party or otherwise, does not apply to one named as executor in a will, because such person is not really and legally an executor until the will has been established,² nor to one * who opposes the probate as guardian of minor [* 477] heirs.³ In Massachusetts, the exception from such an enabling statute of "attesting witnesses to a will or codicil" is held not to apply to an executor who is also one of the subscribing witnesses;⁴ which would, *a fortiori*, qualify one who is named as executor, but who is not a subscribing witness, as a competent witness to the probate. So in New York⁵ and North Carolina.⁶ In the latter State the statute of 1866, removing the disqualification of interest, is held to apply to witnesses in will cases, rendering legatees and devisees competent to prove the will, except they be attesting witnesses.⁷ In Missouri, the statute removing the disability of witnesses on account of interest was held to enable beneficiaries under a will, who were not subscribing witnesses, to testify in support of its probate;⁸ but this was subsequently qualified to the extent of requiring proof to be made of due execution and attestation by the subscribing witnesses, and holding interested witnesses incompetent to supply such proof;⁹ and later still it was held by the Supreme Court that a legatee whose interest in the establishment of a will still continues, though not an attesting witness, will not be allowed to testify as to its due execution.¹⁰ In Pennsylvania, one appointed as executrix is

¹ *Milton v. Hunter*, 13 Bush, 163, 168; *Harper v. Harper*, 1 Th. & C. 351, 359, 360; *Elliott v. Welby*, 13 Mo. App. 19, 28. But see as to the law in Missouri, *infra*.

² *McKeen v. Frost*, 46 Me. 239, 248.

³ *Ib.*, p. 249.

⁴ *Wyman v. Symmes*, 10 Allen, 153, 154.

⁵ *Matter of Wilson's Will*, 103 N. Y. 374.

⁶ *Verter v. Collins*, 101 N. C. 114.

⁷ Thus a devisee under a holograph will was held competent to prove the same, and that such testimony did not avoid the devise, because the operative words of the avoiding act apply only to wills that have attesting witnesses: *Hampton v. Hardin*, 88 N. C. 592, 595.

⁸ *Garvin v. Williams*, 50 Mo. 206, 212, following *Shailer v. Bumstead*, 99 Mass.

112, which similarly construes a Massachusetts statute of like import; *Gamache v. Gambs*, 52 Mo. 287; *Harris v. Hays*, 53 Mo. 90, 95.

⁹ *Miltenberger v. Miltenberger*, 8 Mo. App. 306.

¹⁰ *Miltenberger v. Miltenberger*, 78 Mo. 27, 30. The reason given is that "legatees and devisees are not allowed to be attesting witnesses while their interest as such continues, and the policy of the law, as indicated in these sections (of the statute) would be entirely frustrated if they should be permitted to prove the execution of the will because they had not signed it as attesting witnesses." The cases of *Garvin v. Williams* and *Gamache v. Gambs*, *supra*, are alluded to, and held not in conflict with the doctrine announced.

held competent to testify to the proper execution of a will.¹ In some States the legatees and heirs at law, in a contest to set aside a will, are not competent witnesses to show the testamentary incapacity of the testator;² in others a legatee is held a competent witness to the testator's capacity.³

Competency
of parties in
will contest.

There seems to be no reason why a legatee or other person interested in the will should not be competent to testify *against* a will, on the same ground which renders an heir competent to testify in its favor, where his interest is diminished by the probate of the will.⁴ So the incompetency of the deceased's attorney or physician to testify to professional communications is waived by the testator's request to him to sign as an attesting witness;⁵ and it is generally held that the executor may waive the statutory inhibition against such testimony by the testator's physician.

[* 478] * § 220. **Proof of the Testator's Sanity.** — The necessity of making proof of the testator's sanity in order to secure the probate of his will, and that the burden of making such proof rests naturally upon the proponent, has been pointed out in a former chapter.⁶ It was there shown that in a number of States the proponent may rely upon the ordinary presumption of sanity as constituting the *prima facie* proof, sufficient in the absence of rebutting evidence; but that in others affirmative proof is required on this point, in default of which the will cannot receive probate. It was also shown, that the testimony of non-experts is necessarily admissible to establish the sanity or insanity of the testator in proceedings to establish the will,⁷ and that there is a difference between the testimony of experts and non-experts in this, that the latter must give not only their opinion of the testator's sanity, but also the facts upon which such opinion is based; except that subscribing witnesses are always heard on this question, and are not usually required to state the facts

¹ Combs and Hankinson's Appeal, 105 Pa. St. 155.

² Kerr v. Lunsford, 31 W. Va. 659, 669; Brace v. Black, 125 Ill. 33. See Goerke v. Goerke, 80 Wis. 516 (disqualifying a legatee under the circumstances); McDonald v. McDonald, 142 Ind. 55, 87 (holding parties incompetent except as to such matters as were open to the observation of all the testator's acquaintances). See Valentine's Will, 93 Wis. 45; Goldthorp's Estate, 94 Iowa, 336 (disqualifying witness as to facts learned by transactions with deceased).

³ Foster v. Dickerson, 64 Vt. 233; Brown v. Bell, 58 Mich. 58; Henry v. Hall, 106 Ala. 84, 101. In Iowa a legatee can testify, except as to personal transac-

tions with deceased: Denning v. Butcher, 91 Iowa, 425, 433; Goldthorp's Estate, *supra*. In Florida, on a contest of a will, it was held that the heirs at law, next of kin, and devisees are competent witnesses as to the *factum* of the execution of the will: Hays v. Ernest, 32 Fla. 18, 25, and cases cited.

⁴ Leslie v. Sims, 39 Ala. 161; Smalley v. Smalley, 70 Me. 545; Crocker v. Chase, 57 Vt. 413, 421 (excluding the witness, however, on another ground); Campbell v. Campbell, 130 Ill. 466.

⁵ See *ante*, § 42, p. * 76, on attesting witnesses.

⁶ *Ante*, § 26.

⁷ *Ante*, § 28, and cases there cited.

What testimony is admissible to prove testator's sanity.

upon which their opinion rests. Testimony may be given as to the mental condition of the testator recently before, at, and shortly after the time of making the will; and it is competent for the witness, though neither an expert nor attesting witness, to state whether he observed any incoherence of thought in the testator, or anything unusual or singular in respect to his mental condition;¹ whether, in his opinion, the testator had mind enough to enable him to have a reasonable judgment of the kind and value of the property he proposed to dispose of by will;² whether he appeared unconscious of what was going on around him, and much prostrated by sickness, and did not appear to * know a certain individual, one of his [* 479] neighbors; whether an endeavor to converse with him proved unsuccessful because he was insensible;³ whether his eyesight was good enough to have enabled him to see the witness, if his mind had been right; whether he looked at the witness with a vacant stare; and whether his countenance and appearance indicated childishness;⁴ and it is said that the testimony of opinions and impressions obtained from personal knowledge and actual observation in such cases are "no more nor less than statements of fact differing from ordinary statements only because of the peculiarity of the subject."⁵ But the mere naked opinion of persons who are neither subscribing witnesses nor experts is inadmissible;⁶ nor can such persons be allowed to give their opinion upon a hypothetical case proved by others, but not witnessed by themselves.⁷

¹ "We do not understand this to be the giving of an opinion as to the condition of the mind itself, but only of its manifestations in conversation with the witness": Wells, J., in *Nash v. Hunt*, 116 Mass. 237, 251. "The question whether there was an apparent change in a man's intelligence or understanding, or a want of coherence in his remarks, is a matter not of opinion, but of fact, as to which any witness who has had opportunity to observe may testify, in order to put before the court or jury the acts and conduct from which the degree of his mental capacity may be inferred": Gray, J., in *Barker v. Comins*, 110 Mass. 477, 487, citing *Hastings v. Rider*, 99 Mass. 622, 625.

² *Bost v. Bost*, 87 N. C. 477, citing *Lawrence v. Steel*, 66 N. C. 584, and *Horne v. Horne*, 9 Ired. 99.

³ *Halley v. Webster*, 21 Me. 461, 464. "These," the court say, "were not mere matters of opinion, but facts, somewhat of a general cast, and combining many particulars."

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⁴ *Irish v. Smith*, 8 Serg. & R. 573, 578. In this case evidence was held proper that the testator's wife said in presence of her husband, sitting at the table, that he did not attend to business, that he was incapable, and that the testator said nothing: p. 578.

⁵ Perkins in *Wms. Ex.* [347], citing *Campbell, J.*, in *Beaubien v. Côté*, 12 Mich. 459, 507; *Potts v. House*, 6 Ga. 324; *Duffield v. Morris*, 2 Harring. 375; *Grant v. Thompson*, 4 Conn. 203, 208; *Harrison v. Rowan*, 3 Wash. C. C. 580; *Rambler v. Tryon*, 7 Serg. & R. 90; *Townshend v. Townshend*, 7 Gill, 10; *Dunham's Appeal*, 27 Conn. 192, 197. See also list of cases, *Wms. Ex.* [346], note (d³), commencing with *Clary v. Clary*, 2 Ired. 78.

⁶ *Wms. Ex.* [346], citing numerous American cases, note (d³); *Ellis v. Ellis*, 133 Mass. 469.

⁷ *Bell v. McMaster*, 29 Hun, 272, citing *Clapp v. Fullerton*, 34 N. Y. 190; *Hewlett v. Wood*, 55 N. Y. 634; *Appleby v. Brock*, 76 Mo. 314, 318.

The testimony of educated practising physicians is admitted upon subjects of medical science; and it has been held that the difference between the opinion of one who has made insanity a special study, and that of one who has not, is in the weight rather than in the competency, of the testimony.¹

Testimony of experts.

But one who has not made the subject of mental disease a special study should not be permitted to give his opinion on a hypothetical case, although he might give his opinion as to the mind of a person

so far as he could testify from his personal observation;² * and this although he is not the

Physicians and sick-nurses considered experts.

family physician.³ So physicians in general practice and sick-nurses are supposed to be experts as to the effect, upon the mental capacity of a patient, of the progress of a disease resulting in death.⁴ Ordinarily, the witness allowed to give his opinion on a state of facts not within his own knowledge, but which is supposed to be in evidence before the jury, or, as is usually said, upon a hypothetical case, must first be shown to be an expert;⁵ and whether a witness not shown to be an expert is qualified to express an opinion as a conclusion of fact, is to be decided by the judge presiding at the trial.⁶ Whether one has merely studied a profession or science, without being engaged in the practice of it, or is in full practice, and how long, do not affect the competency of such person as a witness, but may go to his credit.⁷ No preference is given in law to any particular school of the medical profession.⁸

§ 221. **Proof of Lost Wills.** — The presumption arising, where a will which was in the possession of the deceased cannot be found at the time of his death, that it was destroyed by the testator *animo revocandi*, may be rebutted by proof that it was destroyed after his death, or during his lifetime without his knowledge or consent;⁹ or by the

The presumption of destruction *animo revocandi* of a lost will may be rebutted,

¹ *Baxter v. Abbott*, 7 Gray, 71, 78. Even as to the weight of such evidence, Thomas, J., holds the preference to be with a family physician, whose opinion "should have far greater weight with a jury than that of any number of physicians who had made insanity a special study, but who were called to give an opinion upon what is always, and necessarily, an imperfect statement of the facts and symptoms": p. 79.

² *Commonwealth v. Rich*, 14 Gray, 335, 337.

³ *Hastings v. Rider*, 99 Mass. 622, 625; *Hathorn v. King*, 8 Mass. 371.

⁴ *Fairchild v. Bascomb*, 35 Vt. 398, 408.

⁵ *Kempsey v. McGinniss*, 21 Mich. 123, 137. A hypothetical question, asked an

expert, should include only such facts as are admitted or established, or which there is some evidence tending to establish; it is not a question as to the weight of evidence, but whether there was any evidence tending to prove the fact: *Norman's Will*, 72 Iowa, 84; *Ray v. Ray*, 98 N. C. 566.

⁶ *Commonwealth v. Sturtivant*, 117 Mass. 122, 137; *Tullis v. Kidd*, 12 Ala. 648, 650.

⁷ *Tullis v. Kidd*, *supra*.

⁸ *Bowman v. Woods*, 1 Green (Iowa), 441.

⁹ *Ante*, § 48, page *91; *Happy's Will*, 4 Bibb, 553; *Gaines v. Hennen*, 24 How. (U. S.) 553, 559, *et seq.*; *Graham v. O'Fallon*, 3 Mo. 507; *Kitchens v. Kitchens*, 39 Ga. 168; *Hall v. Allen*, 31 Wis. 691; *Morris v. Swaney*, 7 Heisk. 591; *Baugarth*

testator himself while he was under the fraudulent influence of another,¹ or in a fit of insanity, when he was incapable of understanding the nature and effect of his act,² and such a will may, upon positive proof of destruction, or of * diligent search and non-existence, be ad- [* 481] mitted to probate.³ The proof must show that the destruction was unauthorized and improper;⁴ and if by some one after the testator's death, that it was accidental; for if it appear that the proponent destroyed it voluntarily, without mistake or accident, he will not be permitted to prove it by secondary evidence.⁵ In Ohio, the proof must show loss or destruction after the testator's death, or it cannot receive probate unless produced;⁶ and so in New York⁷ and Washington,⁸ unless the same was fraudulently destroyed in the testator's lifetime. Generally, however, the presumption of destruction *animo revocandi* may be rebutted by such evidence as produces a moral conviction to the contrary,⁹ and the acts and declarations of the testator are admissible for such purpose.¹⁰ So also it may be proved by circumstantial evidence that the

v. Miller, 26 Oh. St. 541; *Kearns v. Kearns*, 4 Harring. 83; *Everitt v. Everitt*, 41 Barb. 385; *Minkler v. Minkler*, 14 Vt. 125; *Kidder's Estate*, 57 Cal. 282; *Jaques v. Horton*, 76 Ala. 238, 245.

¹ *Voorhees v. Voorhees*, 39 N. Y. 463, 466.

² *Idley v. Bowen*, 11 Wend. 227; *Ap- person v. Cottrell*, 3 Port. 51, 65. See cases cited *ante*, § 48, p. * 89, note.

³ Cases, *supra*; *Eure v. Pittman*, 3 Hawks, 364; *Kaster v. Kaster*, 52 Ind. 531; *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401; *Harris v. Harris*, 36 Barb. 88; *Ap- person v. Cottrell*, 3 Port. 51, 65, citing *Trevelyan v. Trevelyan*, 1 Phillim. 149, 153.

⁴ *Idley v. Bowen*, 11 Wend. 227, 237.

⁵ *Wyckoff v. Wyckoff*, *supra*.

⁶ *Sinclair's Will*, 5 Oh. St. 290.

⁷ Code Civ. Pr. § 1865; *Matter of Marsh*, 45 Hun, 107.

⁸ *Harris' Estate*, 10 Wash. 555, citing Code, § 879.

⁹ *Will of Foster*, 13 Phila. 567, 568 (citing *Davis v. Davis*, 2 Addams, 223, 226; 1 Redf. Wills, 329); s. c. 87 Pa. St. 67, 75.

¹⁰ *Will of Foster*, *supra* (drawing a distinction between the declarations of a testator touching the contents of a will, which are of little weight especially when made to importuning relatives, and such declarations as showing the testator's con-

viction that he has a will in existence at the time of his death, and citing *Jones v. Murphy*, 8 W. & S. 275, *Youndt v. Youndt*, 3 Grant, 140, and *Havard v. Davis*, 2 Binn. 406); *Clark v. Turner*, 50 Neb. 290 (holding likewise: 298); *Valentine's Will*, 93 Wis. 45, 55; *McDonald v. McDonald*, 142 Ind. 55, citing list of cases on p. 83; *Johnson's Will*, 40 Conn. 587, 588; *Matter of Page*, 118 Ill. 576, 579; *Durant v. Ashmore*, 2 Rich. 184. So his declarations that he has no will, or that he has destroyed his will, are evidence to show that the will has been revoked: *Durant v. Ashmore*, *supra*; *Behrens v. Behrens*, 47 Oh. St. 323; *Valentine's Will*, 93 Wis. 45, 55; *Miller v. Phillips*, 9 R. I. 141, where declarations of the testatrix were allowed to rebut the presumption of revocation by her marriage. In New York it was held that declarations of the deceased are incompetent to prove the existence and contents of a will: *Grant v. Grant*, 1 Sandf. Ch. 235, 237, citing *Dan v. Brown*, 4 Cow. 483, and *Jackson v. Betts*, 6 Cow. 377; but the better opinion seems to be that such declarations are admissible as circumstances: *Hatch v. Sigman*, 1 Dem. 519, 525; *Matter of Marsh*, 45 Hun, 107, reviewing the authorities. See *Wilbourn v. Shell*, 59 Miss. 205, where a holograph which the testator caused to be copied to correct the spelling and make

will has been lost or destroyed without the knowledge of the testator.¹ Where a will is detained by a foreign court, so that the proponent cannot produce it for probate, secondary evidence thereof is admissible, as much so as if it were a lost will.²

Will detained by a foreign court may be proved like a lost will.

[* 482] * The execution and attestation of the lost will must be proved with the same certainty and fulness as in case of proving an existing will, including proof of the testator's sanity or testamentary capacity; and by the same witnesses which are required to prove a will produced for probate. Thus the subscribing witnesses must be called, if within reach of the process of the court; and if not, depositions of such as may be reached must be taken, and if the law does not require the depositions of witnesses residing abroad, then proof may be taken as in case of the death or insanity of subscribing witnesses.³ The declarations of the deceased that he had made a will are not sufficient to prove either the due execution or the contents of a will, unless corroborated by other evidence, and if there is no corroborating evidence, such declarations should be rejected;⁴ and if there is no legal evidence that a will ever existed, there can be no evidence of its fraudulent abstraction or suppression.⁵

Proof of execution and attestation of lost will.

The contents of the lost will upon which probate is prayed must be proved clearly and distinctly,⁶ with a sufficient degree of certainty to establish the legacies and devises, and that none have been omitted.⁷ It was laid down by

Proof of contents of lost will.

it more legible and attempted to execute the copy, in which he failed on account of defective attestation, was admitted to probate, notwithstanding its destruction by the testator, on the testimony of a single witness.

¹ *Schultz v. Schultz*, 35 N. Y. 653.

² *Loring v. Oakey*, 98 Mass. 267, 269; *per* Field, J., in *Robertson v. Pickrell*, 109 U. S. 608, 610. And see *Russell v. Hartt*, 87 N. Y. 19, where the foreign will was inspected by commissioners of the court; *Matter of Delaplaine*, 5 Dem. 398, affirmed 45 Hun, 225.

³ *Bailey v. Stiles*, 2 N. J. Eq. 220, 231; *Graham v. O'Fallon*, 3 Mo. 507 (granting probate of the lost will on the evidence of one of the subscribing witnesses); *Durant v. Ashmore*, 2 Rich. 184 (showing the competence of attesting witnesses to be the same where the will is lost as where it still exists); *Matter of Russell*, 33 Hun, 271; *Collyer v. Collyer*, 4 Dem. 53; *Matter of Page*, 118 Ill. 576, 578; *Harris' Estate*, 10 Wash. 555, 558.

⁴ *Mercer v. Mackin*, 14 Bush, 434, 439.

⁵ *Mercer v. Mackin*, *supra*.

⁶ In New York, Washington, Indiana, and California two witnesses are required by the statute to prove the contents of a lost will: *Kidder's Estate*, 66 Cal. 487; *Harris' Estate*, 10 Wash. 555; *Jones v. Casler*, 139 Ind. 382, 389; but a correct draft or copy of it is in New York and Indiana held to be equivalent to one witness: *Collyer v. Collyer*, 4 Dem. 53, 62; *Sheridan v. Houghton*, 6 Abb. N. C. 234; and they need not testify to the exact language; but must prove sufficient of the substance to enable the decree of probate to incorporate the whole will: *McNally v. Brown*, 5 Redf. 372; *Jones v. Casler*, 139 Ind. 382, 389; the appointment of an executor is not an indispensable part of the will, and it is not essential to prove it: *Early v. Early*, 5 Redf. 376. Each of the witnesses must be able to testify to all of the disposing parts of the will: *In re Raser*, 6 Dem. 31.

⁷ Will of Foster, *supra*; *Davis v. Sig-*

Swinburne,¹ that, "if there be two unexceptionable witnesses who did see and read the testament written, and do remember the contents thereof, these two witnesses, so deposing to *the tenor [* 483] of the will, are sufficient for the proof thereof in form of law;"² but it seems now to be held in England that the contents of a lost will, like those of any other instrument, may be proved by secondary evidence; that they may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached; and that declarations, written or oral, made by a testator, both before and after the execution of his will, are in the event of its loss admissible as secondary evidence of its contents.³ In the absence of statutory provisions on this subject this is recognized in the several States to be the law, at least to the extent of establishing the contents by the testimony of a single witness.⁴ The rule that, where one destroys a written instrument, an innocent party will not be required to make strict proof, in a judicial inquiry concerning its contents, against the spoliator, is sometimes applied to a will; where part of the heirs of a testator connive at the destruction of his will, an innocent legatee may obtain probate of the same upon proof in general terms of the disposition which the testator made of his property, and that the instrument purported to be his will and was duly

Proof where
will is de-
stroyed by
heirs at law.

ourney, 8 Met. (Mass.) 487; *McBeth v. McBeth*, 11 Ala. 598. In *Skeggs v. Horton*, 82 Ala. 352, a charge to the jury, that "unless the evidence of contents of the alleged will is clear and positive,—not vague or uncertain recollections,—and of such a character as to leave no reasonable doubt as to any of the substantial parts of the paper, the jury should find for the contestants," was said to invoke too strict a rule, and was therefore rightly refused.

¹ Swinb., pt. 6, § 14, pl. 4.

² Wms. Ex. [378] *et seq.*

³ Perkins's note to Wms. Ex. [380]; *Sugden v. Lord St. Leonards*, L. R. 1 Pr. D. 154; see opinion of Sir J. Hannen, Pr., p. 176, of *Cockburn, C. J.*, p. 220 *et seq.*, of *Jessel, M. R.*, p. 238; the case of *Brown v. Brown*, 8 E. & B. 876, so holding, is contrasted with *Wharram v. Wharram*, 3 Sw. & Tr. 301, 33 L. J. (P. M. & A.) 75, and fully approved by all the judges after a full discussion. This case overrules *Quick v. Quick*, 3 Sw. & Tr. 442, holding declarations of an alleged testator as to the contents of a will not produced incompetent to prove its contents.

⁴ *Skeggs v. Horton*, 82 Ala. 352;

Jacques v. Horton, 76 Ala. 238, 246; *Lewis v. Lewis*, 6 S. & R. 489, *dictum* by *Duncan, J.*, 497; *Baker v. Dobyns*, 4 Dana, 220, 221; *Matter of Page*, 118 Ill. 576; *Dickey v. Malechi*, citing earlier Missouri cases, 6 Mo. 177, 184; *Varnon v. Varnon*, 67 Mo. App. 534; *Kearns v. Kearns*, 4 Harring. 83 (where the will was destroyed by the heir at law). See *Jackson, C. J.*, in *Burge v. Hamilton*, 72 Ga. 568, 613. But in Tennessee two witnesses are necessary: *Hunter v. Gardenhire*, 13 Lea, 658, 662. Two witnesses are required by statute in several States; see *supra*, p. *482. A long list of cases is given in *McDonald v. McDonald*, 142 Ind. 55, on p. 83, which hold declarations of the testator admissible to prove the contents of a lost will, if no better evidence is admissible. But in many States the rule is followed that while such declarations are admissible as corroborative of other evidence, yet the contents of a lost will cannot be proved *solely* by the testator's declarations: *Clark v. Turner*, 50 Neb. 290, citing numerous cases and deducing this to be the better rule on principle and authority.

attested by the requisite number of witnesses; and in such case it is not necessary to prove the sanity of the testator by affirmative evidence in the absence of proof to the contrary.¹

It appears from a discussion on the revocation of wills, in a former chapter,² that the execution of a later will inconsistent with a former one operates as a revocation of the former will, though the [* 484] revoking will is not produced.³ Mr. Williams * insists⁴ that

where the revocation of an existing will is sought to be established by proof of the execution of a subsequent will, not appearing, the evidence ought to be most clear and satisfactory, and if parol evidence alone be relied on, such evidence ought to be stringent and conclusive;⁵ yet the proof may be sufficient to be availed of as a revocation in opposition to the probate of the will revoked by it, though insufficient to justify the probate of the lost will.⁶

Proof of a lost will revoking a former will.

It seems to result from the necessity of proving the contents of a lost will with sufficient certainty and clearness to admit of their legal construction, that a part only of a lost or destroyed will where other parts cannot be proved, or where it is not known whether the instrument contained other or contradictory provisions, cannot be admitted to probate. It is so held in several States.⁷ But in others, isolated portions of lost wills clearly proved have been established, although other portions could not be proved.⁸ The subject of proving lost wills is now regulated by statute in many of the States.⁹ It is held that there is no trial by jury to establish a lost will, unless given by statute.¹⁰

Proof of part of a lost will.

§ 222. **Probate of Wills in Part and in Fac-simile.** — Although it is

¹ *Anderson v. Irwin*, 101 Ill. 411, 414; *Kearns v. Kearns*, 4 Harring. 83. If necessary, the law will prevent the perpetration of a fraud by permitting a presumption to supply the suppressed proof, as against the spoliator: *Lambie's Estate*, 97 Mich. 49, 55. But as to the fact of the destruction itself, it is not sufficient for the proponent to show that persons interested to establish intestacy had an opportunity to destroy the will; he must go further and show, by facts and circumstances, that the will was actually, fraudulently, destroyed: *Collyer v. Collyer*, 110 N. Y. 481, 486; *Hard v. Ashley*, 88 Hun, 103.

² *Ante*, § 51, p. * 98.

³ *Jones v. Murphy*, 8 Watts & S. 275, citing *Clark v. Morton*, 5 Rawle, 235, and *Lawson v. Morrison*, 2 Dallas, 286.

⁴ *Wms. Ex.* [162].

⁵ Citing *Cutto v. Gilbert*, 9 Moore, P. C. 131, 140, 141.

⁶ *Wallis v. Wallis*, 114 Mass. 510, citing *Helyar v. Helyar*, 1 Lee, 472; *Nelson v. McGiffert*, 3 Barb. Ch. 158, 164; *Day v. Day*, 3 N. J. Eq. 549; and see *Cunningham in re*, 38 Minn. 169.

⁷ *Butler v. Butler*, 5 Harring. 178; *Davis v. Sigourney*, 8 Met. (Mass.) 487; *Durfee v. Durfee*, 8 Met. (Mass.) 490, note; *Rhodes v. Vinson*, 9 Gill, 169, 171.

⁸ *Jackson v. Jackson*, 4 Mo. 210; *Dickey v. Malechi*, 6 Mo. 177; *Steele v. Price*, 5 B. Mon. 58, 72; *Burge v. Hamilton*, 72 Ga. 568, 623, 632; *Skeggs v. Horton*, 82 Ala. 352. This is specially permitted as against the spoliator of a will in favor of an innocent legatee: *Jones v. Casler*, 139 Ind. 382, 393.

⁹ So in California, Colorado, Minnesota, and other States.

¹⁰ *Wright v. Freltz*, 138 Ind. 594.

not the province of the court of probate to pass upon or determine the legal validity of the provisions of a will, or whether they are rational and capable of being carried into effect, yet it becomes necessary sometimes to admit the will to probate in part, and reject it in part. For if a court of probate be satisfied that a particular clause has been inserted by fraud, in the lifetime of the testator, without his knowledge,¹ or by forgery, after his death,² or that he has been induced by fraud or undue influence to make it a part of his will,³ probate will be granted of the instrument, with the reservation of that * clause.⁴ [* 485] And so where a page is torn from an executed will and another substituted without re-execution, the will, as originally executed, will be admitted to probate; the contents of the destroyed page being proved by competent testimony, no effect being given to the invalid substituted page.⁵ Or where a clause is inadvertently introduced in a testamentary paper, which the testator has not directed to be inserted, and he executes the paper, not having been read over to him, probate will be granted of the remainder of the paper, omitting such clause.⁶ And the probate of a will cannot be defeated by proof that there was a codicil, which is lost and not shown to contain a revoking clause.⁷

So while a document referred to in the will and shown to have been in existence at the time of its execution, and which is clearly identified as the document to which reference was made by the testator, may be adjudged to form part of such will,⁸ yet if such extraneous paper be not in existence at the time of the execution of the will, it is not entitled to probate as part of the will, though the will be admitted to probate.⁹ And

¹ 1 Wms. Ex. [377], citing *Barton v. Robins*, 3 Phillim. 455, note (b).

² *Plume v. Beale*, 1 P. Wms. 388.

³ *Ante*, § 34; *In re Welsh*, 1 Redf. 238, 248; *Burger v. Hill*, 1 Bradf. 360, 376; *Morris v. Stokes*, 21 Ga. 552; *Harrison's Appeal*, 48 Conn. 202; *Florey v. Florey*, 24 Ala. 241, 248; *Eastis v. Montgomery*, 93 Ala. 293.

⁴ 1 Wm. [377] citing *Allen v. McPherson*, 1 H. L. Cas. 191; *Melnish v. Milton*, L. R. 3 Ch. D. 27.

⁵ *Varnon v. Varnon*, 67 Mo. App. 534.

⁶ *Goods of Duane*, 2 Sw. & Tr. 590; *Hill v. Burger*, 10 How. Pr. 264, 269.

⁷ *Sternberg's Estate*, 94 Iowa, 305.

⁸ *Dyer v. Erving*, 2 Dem. 160, 165, and cases cited; *Siler v. Dorsett*, 108 N. C. 300; *Newton v. Seamen's Fr. Soc.*, 130 Mass. 91.

⁹ *In re Shillaber*, 74 Cal. 144. So where the will refers to an executed in-

strument, the latter cannot be made part of the will, unless such instrument be executed and in existence when the will is made: *Hunt v. Evans*, 134 Ill. 496, 505; and see *Tuttle v. Berryman*, 94 Ky. 553; *Vestry v. Bostwick*, 8 Dist. Col. App. 452, and in *Re O'Neil*, 91 N. Y. 516, 523, *Ruger, Ch. J.*, says: "It is not believed that any paper or document containing testamentary provisions, not authenticated according to the provisions of our Statute of Wills, has yet been held to be a part of a valid testamentary disposition of property simply because it was referred to in the body of the will." This statement was quoted approvingly in *Matter of Conway*, 124 N. Y. 455, 460, by Judge Parker (see dissenting opinion of Brown, J., p. 466); while in *Booth v. Baptist Church*, 126 N. Y. 215, 247, the court say that "it is unquestionably the law of this State that an unattested paper which is of testament-

where a man's mind gives way in the very act of dictating a will, before completing all the dispositions he intends to make, that part which he dictated while in possession of his mental faculties cannot be set up in his will.¹

This principle of probate in part has been extended to cases in which part of a destroyed will only could be proved, and probate granted as to so much of such will;² and relied on as justifying the rejection of clauses held void as being inconsistent with public policy, or impossible of execution, while the remainder of the will was admitted to probate.³ But this seems inconsistent with the functions of a court of probate, which determines only whether the instrument propounded has been executed by the testator and attested by the witnesses in the manner prescribed by the statute, and that he possessed sufficient testamentary capacity,—in other words, whether the instrument is the testator's spontaneous act, expressing his last will in the form recognized by law. Its approval

Function of probate courts extends only to determine validity of execution and attestation, and testamentary capacity.

of the will relates only to the form: void bequests are not validated thereby, nor should the probate distinguish between valid and void, certain and uncertain, rational or impossible, dispositions of the testator.⁴ All such questions are for the courts of construction, which are bound by the judgments of courts of probate only as to the due execution.⁵ Hence, although the court of probate may reject such portions of the paper as are not the testator's spontaneous act or will, [*486] it cannot, even by consent, order any passage to be *expunged which the testator, being of sound mind, intended to form part of it.⁶

Questions of validity of disposition are determined by courts of construction.

Several testamentary papers and codicils may together constitute the last will of the testator, and should all receive probate together, as constituting one will.⁷

any nature cannot be taken as part of the will, even though referred to by that instrument."

¹ *Tabler v. Tabler*, 62 Md. 601, 607.

² *Ante*, § 221.

³ *Kenrick v. Cole*, 61 Mo. 572. (This case was subsequently overruled. See *infra*.) The will contained a clause in conflict with the constitution of 1865 (under which the probate was granted) and was admitted to probate with the exception of the unconstitutional clause, both in the probate court *ex parte* and in the circuit court in a proceeding to establish the clause rejected.

⁴ See authorities on this point *post*, § 228, p. *502; *Cox v. Cox*, 101 Mo. 168 (overruling *Kenrick v. Cole*, *supra*; *Bent's*

Appeal, 35 Conn. 523; s. c. 38 Conn. 26, 34; *George v. George*, 47 N. H. 27, 46).

⁵ *Hegarty's Appeal*, 75 Pa. St. 503, 514, citing earlier Pennsylvania and English cases; *Hawes v. Humphrey*, 9 Pick. 350, 362.

⁶ *Wms.* [377], citing *Curtis v. Curtis*, 3 Add. 33, and many English authorities. But though the court cannot expunge any words from the original will, offensive passages, such as scurrilous imputations on the character of another man, have been excluded from the probate and copy kept in the registry: *Goods of Wartnaby*, 4 Notes of Cas. 476; *Marsh v. Marsh*, 1 Sw. & Tr. 528; *Goods of Honywood*, L. R. 2 P. & D. 251.

⁷ See authorities *ante*, § 51.

The effect of interlineations and erasures in a will have been pointed out in an earlier chapter.¹ Where alterations are satisfactorily shown to have been made before execution, it is usual to engross the probate copy of the will as altered, inserting the words interlined in their proper places, and omitting words struck through or obliterated.² But in cases where the construction of the will may be affected by the appearance of the original paper, the court will order the probate to pass in *fac-simile*, so as to assist the court of construction in finding the meaning of the testator.³ This is obviously of great importance where the will is to receive construction in a court different from that which grants the probate, and the court of construction is denied access to the original will. The law seems to be unsettled in England, whether the probate copy is conclusive upon courts of law and chancery courts if it should contain obvious mistakes. It has been repeatedly held that the court construing the will may look at the original,⁴ and, on the other hand, that the probate, in *fac-simile* or otherwise, conclusively settles that the will was executed in the form shown by the probate.⁵ Mr. Williams is of opinion that it may, on the whole, be doubted whether chancery courts in England have not gone beyond the legitimate * means for construing wills, where they have sought aid [* 487] from appearances in the will itself not to be found in the probate, and whether the more proper course is not to apply to the court of probate for a corrected *fac-simile* probate, if it be desired to rely on stops, or capital letters, or any marks which, in truth, are apparent in the will, though not in the probate. "For until the court of probate has sanctioned them as legal parts of the will, *non constat* that they have not been introduced by a stranger, or by the testator himself after the will was executed, or otherwise, so as not properly to form a part of it. And this can only be decided in the probate court, which is bound to exclude from its probate, whether a *fac-simile* pro-

¹ *Ante*, § 49.

² 3 Redf. on Wills, 53, pl. 2.

³ Wms. [331]. If, for example, the testator says, "I give A. B. an annuity of £500, and I also give him £1000;" and the testator then strikes out down to and including the words "£500": *Gann v. Gregory*, 3 DeG., M. & G. 777, 780. Suppose, again, the words "to be equally divided amongst them" interlined (without any *caret* to show where they were intended to come in), and in such a position that they are applicable to two sets of legatees. In such case, it should seem, there must, of necessity, be a *fac-simile* probate.

⁴ In *L'Fit v. L'Batt*, 1 P. Wms. 526,

a will was proved in the original French language, and under it, in the same probate, it was translated into English, but, it appeared, falsely translated. The Master of the Rolls held that the court might determine what the translation ought to be. In *Compton v. Bloxham*, 2 Coll. 201, the Vice-Chancellor begged to have it observed that he had sent for and examined the original will, and had been influenced by it in his construction. So in *Shea v. Boschetti*, 18 Beav. 321, and *Manning v. Purcell*, 7 DeG., M. & G. 55, the original wills were examined for the purpose of construction.

⁵ *Gann v. Gregory*, *supra*; *Taylor v. Richardson*, 2 Drew. 16.

bate or not, all such appearances on the face of the will as do not legitimately belong to it as a testamentary instrument.”¹

The same view seems applicable in the American States. Mr. Schouler says: “To construe a will duly probated, and define the rights of parties in interest, remains for other tribunals; they must interpret the charter by which the estate should be settled in case of controversy; while the probate court, by right purely of probate or ecclesiastical functions, establishes and confirms that charter. But in order to do this, the probate court throws out the false or the superseded will, or the instrument whose execution does not accord with positive statute requirements; it determines what writing or writings shall constitute the will.”² Hence a decree by a court granting probate of a will, that it is null and void in so far as it conflicts with the legal, constitutional, and equitable rights of the widow, can have no legal effect.³

§ 223. **Probate of Holographic Wills.**—The difference between ordinary wills, requiring attestation by subscribing witnesses and holographic wills, is, as appears from the discussion of this subject in a former chapter,⁴ that the latter are valid, if written wholly by the testator, without attestation. It was there pointed out in what States such wills are admitted to probate, and also that in some of them the statutes provide for the method of proof by which they must be established; it is not proper, therefore, to repeat in this connection the statutory requirements concerning their probate.⁵ It is necessary to bear in mind, * however, that proof must be made that the whole of the instrument was written by the hand of the testator, and generally also, that he dated and signed it.⁶ In Kentucky it was decided that a paper wholly written and subscribed by a person, with the intention of making it his will, is valid as a will, although he may not have thought it a completed paper by reason of a mistaken notion on his part that the law required witnesses to such a paper.⁷ Proof should be made in strict accordance with the rules prescribed by the statute.⁸ In some

Proof necessary to establish a holograph.

¹ Wms. Ex. [569].

² Schoul. Ex. § 85.

³ O'Docherty v. McGloinn, 25 Tex. 67.

⁴ Ante, § 43.

⁵ See also the cases there cited, passing upon some of the principles and procedure involved.

⁶ It is held in some States that a printed form, filled in by the testator, is not a holographic will. Ante, § 43, citing Estate of Rand, 61 Cal. 468. In Tennessee a will written by the testator's own hand, although not signed by him nor attested by witnesses, is good as to per-

sonalty, provided the handwriting be sufficiently proved: Suggett v. Kitchell, 6 Yerg. 429; Reagan v. Stanley, 11 Lea, 316.

⁷ Toebe v. Williams, 80 Ky. 661, 664.

⁸ Succession of Clark, 11 La. An. 124. In this State women cannot be subscribing witnesses to a will, but are competent to establish a holograph: Succession of Eubanks, 9 La. An. 147; and such a will may be admitted to probate upon proper proof, although previously admitted improperly: Succession of Clark, supra.

States the handwriting must be proved by three witnesses;¹ in others by two;² and in Kentucky it was held that proof of handwriting by one witness, together with proof of declarations by the testator in corroboration thereof, was sufficient to establish a holograph.³ In Virginia it was doubted whether one or two witnesses are necessary.⁴ In England the rule laid down, before the Wills Act of 1838, in respect of wills of personalty, allowed them to be established upon sufficient proof that the will or signature was in the handwriting of the testator.⁵ Under this rule, it was held to be clearly established in the ecclesiastical courts that similitude of handwriting, even with a probable disposition, is not sufficient to establish a testamentary paper, without some concomitant circumstances, as the place of finding, or the like, to connect it with the party whose will it is alleged to be.⁶ The same doctrine seems to be applicable to the proof of the handwriting in a holographic will, where the statute does not control it. Declarations by the testator are generally admissible in connection * with such evidence,⁷ but are not alone sufficient [*489] to establish the will.⁸

§ 224. **Proof of Nuncupative Wills.**—The method of proving nuncupative wills has been extensively discussed in connection with the statutory regulations affecting this species of testamentary disposition.⁹ In consequence of the disfavor with which this class of wills is looked upon by the courts,¹⁰ it is necessary to observe the utmost strictness in fulfilling the statutory requirements with reference to them, and to prove the testamentary capacity and *animus testandi* by the clearest evidence; any deviation therefrom will, according to the unvarying current of authorities, prove fatal.¹¹ The probate

¹ As in Arkansas, North Carolina, and Tennessee.

² As in Louisiana: "Who are familiar with his handwriting, having often seen him write in his lifetime": Succession of Eubanks, *supra*. But this rule applies only where the probate is not contested; where it is contested *ab initio*, on the ground that the will is a forgery, the ordinary rules of law apply: Succession of Gaines, 38 La. An. 123.

³ *Hannah v. Peak*, 2 A. K. Marsh. 133.

⁴ *Redford v. Peggy*, 6 Rand. 316.

⁵ *Sharp v. Sharp*, 2 Leigh, 249, 254.

⁶ *Wms. Ex.* [350], citing numerous English cases.

⁷ But declarations that he made a subsequent will, in the absence of all testimony of the contents, execution, attestation, or handwriting of such subsequent

will, cannot be introduced as proof of the revocation of a holographic will offered for probate: *Allen v. Jeter*, 6 Lea, 672, 675.

⁸ Succession of Eubanks, *supra*.

⁹ *Ante*, §§ 44, 45.

¹⁰ *Woods v. Ridley*, 27 Miss. 119, 146; deciding, however, that when properly proved they are equally entitled to probate with written wills.

¹¹ *Broach v. Sing*, 57 Miss. 115, 116; *Dorsey v. Sheppard*, 12 Gill & J. 192, 198; *Winn v. Bob*, 3 Leigh, 140; *Prince v. Hazleton*, 20 Johns. 502; *Tally v. Butterworth*, 10 Yerg. 501; *Brayfield v. Brayfield*, 3 Har. & J. 208; *Webb v. Webb*, 7 T. B. Mon. 626, 631; *Rankin v. Rankin*, 9 Ired. L. 156; *St. James Church v. Walker*, 1 Del. Ch. 284; Succession of Dorries, 37 La. An. 833. In Iowa the *animus testandi* was inferred from the tes-

of such a will is, however, conclusive,¹ and cannot, in some States, be set aside or contested in chancery, like a written will, the only remedy of a party aggrieved being by appeal;² but a contest being, in some States, in the nature of an appeal from the judgment of the probate court, every fact which is required to be proved in order to admit the will to probate may be disproved on the contest to show it to be invalid.³

Probate of a nuncupation conclusive.

§ 225. **Admissibility of Declarations as Evidence in the Probate of Wills.** — The conversations, statements, and declarations of the testator are always admissible on the question of his testamentary capacity, since they are the most direct manifestations of his mental condition; their value as evidence being, in this respect, fully equal, if not superior, to that of his acts, conduct, behavior, or

Testator's declarations admissible to prove the condition of his mind;

appearance. Many phases of insanity — delusions, hallucinations, and the like — * are capable of proof by this means only. Hence great latitude is allowed in proving declarations, acts, and statements of a testator, extending over many years, to establish the status of his mind when he made his will.⁴ Of course the declarations are not competent to prove the truth of the matter stated in them, and when the content of a statement or declaration concerns a fact in issue in the proceeding, the jury should be cautioned on this point.⁵ On an imputation of fraud, also, in the making of the will, declarations of the testator are admissible in evidence to show his dislike or affection for his relations, or those who in the will appear to be the objects of his bounty, and respecting his intentions either to benefit them or to pass them by in the disposition of his property.⁶

but not to prove the content of his statements.

tator's expression of his desire: *Mulligan v. Leonard*, 46 Iowa, 692.

¹ *Bradley v. Andress*, 27 Ala. 596; *Brown v. Harris*, 9 Baxt. 386.

² *Page v. Page*, 2 Rob. Va. 424.

³ *Bolles v. Harris*, 34 Oh. St. 38, 41.

⁴ "To enable the jury to determine the real state of mind, the action of that mind, as shown best by conversations, declarations, claims, and acts, is the most satisfactory evidence": *Kent, J.*, in *Robinson v. Adams*, 62 Me. 369, 413; *Rambler v. Tryon*, 7 Serg. & R. 90, 93, allowing declarations that his wife and father-in-law plagued him, wanting him to give her all, or he would have no rest, as showing weakness of mind; *Roberts v. Trawick*, 13 Ala. 68, 83; *Barker v. Barker*, 36 N. J. Eq. 259, 268, holding a denial by the testatrix that she made a will competent to prove want of testamentary capacity, and

that the will was never executed, but not that there was undue influence. See remarks of Surrogate Rollins in *Hammersley v. Lockman*, 2 Dem. 524, 533; *Matter of Clark*, 40 Hun. 233, 338; *Bower v. Bower*, 142 Ind. 194; *Herster v. Herster*, 122 Pa. St. 239, 258; *Hammond v. Dike*, 42 Minn. 273. The making of a former will stands on the same footing to prove testamentary capacity that a declaration stands upon *Brown v. Mitchell*, 87 Tex. 140.

⁵ *Robinson v. Adams*, *supra*; *Boylan v. Meeker*, 28 N. J. L. 274, 279; *Harring v. Allen*, 25 Mich. 505; *Jones v. McLellan*, 76 Me. 49; *Bush v. Bush*, 87 Mo. 480, 485; *Herster v. Herster*, *supra*. See also *In re Calkins*, 112 Cal. 296, 301. Hence declarations of the testator are inadmissible to prove the proper execution of the will: *Walton v. Kendrick*, 122 Mo. 514.

⁶ *Howell v. Barden*, 3 Dev. 442; *Neel*

But such declarations, alone and unsupported by other facts, are not only insufficient to prove undue influence, but their exclusion, in the absence of other evidence, is not erroneous.¹ Nor should declarations

Declarations
inadmissible
to prove revoca-
tion of a will.

tions made so long before or after the making of the will

that they cannot be considered as of the *res gesta*, be admitted to prove the fact of fraud, circumvention, or

imposition.² The revocation of a will cannot be

proved by *the declarations of the testator;³ but his expres- [*491]

sions of approval or dissatisfaction have been held admissible

as bearing upon his intention in destroying the will, or proving that a lost will is not revoked.⁴ Diaries kept and letters written by a

Diaries and
letters subject
to same rule.

testator, either before or after the execution of the will, are, like his verbal declarations, proper evidence as bearing upon his mental capacity, and the condition of his

mind with reference to objects of his bounty, but not competent to prove the facts stated in them, or fraud or undue influence.⁵ It has

been held that the testator's declarations are competent to prove the fact of subscription by the attesting witnesses where one of them denies or fails to remember such fact, on the ground that the testator must certainly know about his own acts, and has no motive to speak falsely;⁶ and in North Carolina the declarations of a testator at any time after the making of the will were held competent to prove that the will in question is not his will.⁷

v. Potter, 40 Pa. St. 483; *Denison's Appeal*, 29 Conn. 399, 402; *Harp v. Parr*, 168 Ill. 459, 470; *Potter v. Baldwin*, 133 Mass. 427; *Gardner v. Friese*, 16 R. I. 640; *Barbour v. Moore*, 4 Dist. Col. App. 535; *Dye v. Young*, 55 Iowa, 433; *Goldthorp's Est.*, 94 Iowa, 336; *Reynolds v. Adams*, 90 Ill. 134, 147; *Parsons v. Parsons*, 66 Iowa, 754; and see in connection herewith, *ante*, § 31, p. *48.

¹ *Cawthorne v. Haynes*, 24 Mo. 236, 239; *Rusling v. Rusling*, 36 N. J. Eq. 603, 608; *Shaw v. Shaw*, 1 Dem. 21, 24; *Kitchell v. Beach*, 35 N. J. Eq. 446, 454; *Storer's Will*, 28 Minn. 9, 12; *Hess's Will*, 48 Minn. 504; *Peery v. Peery*, 94 Tenn. 328, 342; *Kirkpatrick v. Jenkins*, 96 Tenn. 85; *Wurzell v. Beckman*, 52 Mich. 478; *Mullery v. Young*, 94 Ga. 804 (holding declarations inadmissible to prove undue influence); *In re Calkins*, 112 Cal. 296, 302.

² *Smith v. Fenner*, 1 Gall. 170, 172; *Stevens v. Vaneleve*, 4 Wash. C. C. 262, 265; *Shailer v. Bumstead*, 99 Mass. 112, 121, holding that the value of such evidence depends upon its significance and

proximity; *In re McDevitt*, 95 Cal. 17; *Rule v. Maupin*, 84 Mo. 587, 590; *Crocker v. Chase*, 57 Vt. 413; *Conway v. Vizzard*, 122 Ind. 266, 268 (holding declarations admissible to show want of testamentary capacity, but not on the issue of undue influence). See also *Haynes v. Hayden*, 95 Mich. 332.

³ *Jackson v. Kniffen*, 2 Johns. 31; *Reynolds v. Adams*, 90 Ill. 134, 147; *Hoitt v. Hoitt*, 63 N. H. 475, 499; *Slaughter v. Stephens*, 81 Ala. 418; *Kirkpatrick v. Jenkins*, 96 Tenn. 85.

⁴ *Matter of Marsh*, 45 Hun, 107; *Harling v. Allen*, 25 Mich. 505, 507; *Johnson's Will*, 40 Conn. 587; *ante*, § 221, and authorities there cited.

⁵ *Marx v. McGlynn*, 88 N. Y. 357, 374. Whether a memorandum by the testator is admissible, to the effect that he had on that day "made a will in favor of" the beneficiary under the will propounded, and adding the name of the witnesses, was doubted in *New York v. Beekman v. Beekman*, 2 Dem. 635, 639.

⁶ *Beadles v. Alexander*, 9 Baxt. 604.

⁷ *Reel v. Reel*, 1 Hawks, 248, 267;

§ 226. **Wills proved in a Foreign Jurisdiction.** — The principle requiring the title and disposition of real property to be governed exclusively by the law of the country or state in which it is situated, — *lex loci rei sitæ*,¹ — and that requiring personal property to follow the law of the owner's domicil, — *lex domicilii*,² — together with the extra-territorial invalidity of municipal laws and regulations,³ have heretofore produced considerable divergence in respect of wills which have been executed and admitted to probate in sister States or foreign countries, and operate upon property situated within the jurisdiction of the forum where they are sought to be enforced. It is now a fully established rule in England, that in order to sue in any court of law or equity, in respect of the personal rights or property of a deceased person, the plaintiff must appear to [* 492] have *obtained probate of the will, or letters of administration in the court of probate there;⁴ and this is so in America in all the States with the exception of those in which the statutes confer certain powers upon foreign executors and administrators, which may be exercised by virtue of such statutory regulations,⁵ or give validity to a foreign probate.⁶ It follows that a will made in another State or foreign country, and proved there, disposing of property elsewhere, must, except in the States holding as above, be proved in the State where the property is situated also, or courts cannot enforce the provisions of such will.⁷

English rule requiring probate of wills of personalty in jurisdiction of the forum.

So in most American States.

Generally, the court in which the will is to be proved anew will adopt the decision of the court in the foreign country where the testator died domiciled as to the probate of a will disposing of personal property; for it is a clearly established rule, that the law of the country in which the deceased was domiciled at the time of his death not

Probate of will in country of the domicil followed as to personalty.

Hester v. Hester, 4 Dev. 228 (in this case objection was made to the competency of a widow testifying to the declarations of her husband, and overruled; nothing was said as to the competency of the declarations as such).

testamentary or of administration granted to him in the country where the deceased died."

¹ *Ante*, § 168.

² See *ante*, §§ 157 *et seq.*

³ *Ante*, §§ 157 *et seq.*

⁴ Wms. Ex. [362], where the author quotes a note to the American edition of his work, stating "that it has been established as a rule, by repeated decisions in many of the States, that the executor or administrator of a person who dies domiciled in Great Britain, or any other foreign country, cannot maintain an action in the United States, by virtue of letters

⁵ *Mansfield v. Turpin*, 32 Ga. 260; *Karrick v. Pratt*, 4 Greene (Iowa), 144.

⁶ As to which see *infra*, and p. * 494, notes.

⁷ *Campbell v. Sheldon*, 13 Pick. 8, 22; *Campbell v. Wallace*, 10 Gray, 162; *Drake v. Merrill*, 2 Jones L. 368, 373; *Ex parte Povall*, 3 Leigh, 816; *Dixon v. D'Armond*, 23 La. An. 200; *Pope v. Cutler*, 34 Mich. 150, 152; *Townsend v. Downer*, 32 Vt. 183, 216; *Ward v. Oates*, 43 Ala. 515; *Thiebaut v. Sebastian*, 10 Ind. 454, 458; *Helm v. Rookesby*, 1 Met. (Ky.) 49; *Ives v. Allyn*, 12 Vt. 589, 594; *Armstrong v. Lear*, 12 Wheat. 169, 175.

only decides the course of distribution or succession as to personalty, but regulates the decision as to what constitutes the last will without regard to the place either of birth or death, or the situation of the property at that time.¹ It is provided by statute, ^{Statutes giving effect to foreign probate.} that the will of a non-resident, admitted to probate according to the law of the State in which he resided at the time of his death, may be admitted to probate upon the production of a duly authenticated copy thereof together with the probate, without other proof, or * notice, in the States of Ala- [* 493] bama,² Arizona,³ Arkansas,⁴ Colorado,⁵ Delaware,⁶ Florida,⁷ Georgia,⁸ Idaho,⁹ Illinois,¹⁰ Indiana,¹¹ Iowa,¹² Michigan,¹³ Missouri,¹⁴ Mississippi,¹⁵ New York,¹⁶ North Carolina,¹⁷ Oregon,¹⁸ Pennsylvania,¹⁹ South Carolina,²⁰ Texas,²¹ Virginia,²² Washington,²³ West Virginia,²⁴ Wisconsin,²⁵ and Wyoming;²⁶ and with the difference

¹ Wood v. Wood, 5 Pai. 596, 603; Moultrie v. Hunt, 23 N. Y. 394; Nelson v. Potter, 50 N. J. L. 324. See list of American cases collected by Bigelow in his note to the eighth edition of Story's Conflict of Laws, p. 644, note (a). In Louisiana it was held that a will presented for probate and rejected there, but subsequently admitted to probate in New York where the testatrix was domiciled at her death (which occurred in Louisiana) and thereafter again presented to the Louisiana court upon a duly authenticated record of the New York probate, should be recognized and enforced by the Louisiana courts: Gaines' Succession, 45 La. An. 1238.

² Dickey v. Vann, 81 Ala. 425, 432; Ward v. Oates, 43 Ala. 515, 517; such will cannot be contested: Brock v. Frank, 51 Ala. 85.

³ Rev. St. 1887, par. 987.

⁴ Dig. of St. 1894, §§ 7429-7431.

⁵ Hill's Ann. St. Suppl. 1896, § 4678; Corrigan v. Jones, 14 Colo. 311.

⁶ Rev. Code, 1874, ch. 84, § 6-9. (This statute prescribes the manner in which such will must be certified in order to be used in evidence.)

⁷ Rev. St. 1892, § 1811.

⁸ Such foreign probate held conclusive where the will was contested by all the heirs: Thomas v. Morrisett, 76 Ga. 384 (Jackson, Ch. J., dissenting).

⁹ Rev. St. 1887, § 5317.

¹⁰ St. & Curt. Ann. St. 1896, ch. 148, ¶ 9.

¹¹ Ann. St. 1894, §§ 2591-2593. Such

foreign probate cannot be contested in Indiana for any cause: Harris v. Harris, 61 Ind. 117, 126.

¹² Stanley v. Morse, 26 Iowa, 454, holding the foreign probate conclusive; Vance v. Anderson, 39 Iowa, 426; but it must be shown that the foreign court had jurisdiction; Capper's Will, 85 Iowa, 83.

¹³ Gen. St. 1890 (Supplement), § 5805; Laws, 1895, No. 105.

¹⁴ Rev. St. 1889, §§ 8900, 8901; such probate is conclusive: Applegood v. Smith, 31 Mo. 166, 169; this statute applies to wills probated in foreign countries as well as in sister States: Gaven v. Allen, 100 Mo. 293, 299. But one dealing with lands in this State is not charged with constructive notice of the probate of a will in another State: Van Syckel v. Beam, 110 Mo. 589, 593.

¹⁵ Ann. Code, 1892, § 1829. The statute has no application to wills of domiciled citizens in this State: Sturdivant v. Neill, 27 Miss. 157, 165; Bate v. Incisa, 59 Miss. 513.

¹⁶ Throop's Ann. Code, Civ. Proced. 1887, §§ 2703-2705.

¹⁷ Code, 1883, §§ 2156, 2157.

¹⁸ Code, 1887, § 3083.

¹⁹ Pepp. & L. Dig. 1896, p. 1454, § 58.

²⁰ Rev. St. 1893, § 2007.

²¹ Rev. St. 1895, art. 5353.

²² Code, 1887, § 2536.

²³ Code, 1896, §§ 5360, 5361.

²⁴ Code, 1891, ch. 77, § 25.

²⁵ Ann. St. 1889, § 2295.

²⁶ Rev. St. 1887, § 2246.

that notice is required to be given to persons interested likewise in California,¹ Connecticut,² Maine,³ Massachusetts,⁴ Minnesota,⁵ Montana,⁶ Nebraska,⁷ Nevada,⁸ New Hampshire,⁹ New Jersey,¹⁰ Ohio,¹¹ Oklahoma,¹² Rhode Island,¹³ South Dakota,¹⁴ Tennessee,¹⁵ and Vermont.¹⁶

In many of these States it is affirmatively provided that the foreign probate is conclusive only in so far as the will concerns personal property; to pass title to real estate, it must appear, either by proof furnished in the forum *loci rei sitæ*, or by the authenticated copy of the evidence upon which the foreign probate was granted, that in the execution, attestation, and proof of the will the requirements of the law of the State in which the land lies have been complied with.¹⁷

In some of the States the foreign probate seems to [* 494] be made conclusive as to real as * well as to personal property;¹⁸ but unless such be the express or necessary import of the statute, it must affirmatively appear from such foreign probate, or other proof, that the law of the forum has been observed in making and proving the will in order to give validity to its disposition of real estate.¹⁹ There are some States, also, in which the

Even as to
reality, if in
conformity
with the law
rei sitæ.

States in which
foreign probate
is conclusive.

¹ Code Civ. Proced., § 1324.

² Gen. St. 1887, § 550.

³ Rev. St. 1883, p. 538, § 13; *Crofton v. Hsly*, 4 Me. 134, 138; *Spring v. Parkman*, 12 Me. 127, 131.

⁴ Publ. St. 1882, p. 749, § 15; *Dublin v. Chadbourn*, 16 Mass. 433, 441; *Parker v. Parker*, 11 Cush. 519. Conclusive, though no notice was given in the foreign State: *Crippen v. Dexter*, 13 Gray, 330; *Shannon v. Shannon*, 111 Mass. 331.

⁵ *Bloor v. Myerscaugh*, 45 Minn. 29, 30. But it is error to allow such will and proceed to administration, unless it be shown that there is property in the county: *Southard's Will*, 48 Minn. 37.

⁶ Const. Codes & St. 1895, §§ 2350-2352.

⁷ Cons. St. 1892, §§ 1203, 1204 (Code Civ. Proced.).

⁸ Gen. St. 1885, §§ 2693, 2694.

⁹ Publ. St. 1891, ch. 187, § 13.

¹⁰ Gen. St. 1896, p. 2360, §§ 23, 24; an exemplified copy of the foreign will and its probate is not competent evidence, it must be regularly proved and recorded in this State: *Graham v. Whitely*, 26 N. J. L. 254, 258; see *Allaire v. Allaire*, 37 N. J. L. 312.

¹¹ *Bates v. Ann. St.* 1897, §§ 5938-5940.

¹² St. 1890, p. 300, §§ 19-21.

¹³ Gen. L. 1896, p. 705, §§ 10-13.

¹⁴ Comp. L. Ter., §§ 5677-5679.

¹⁵ Code, 1884, § 3024.

¹⁶ St. 1894, §§ 2365-2369; *Ives v. Salisbury*, 56 Vt. 565.

¹⁷ So in Arkansas, Kentucky, Missouri, North Carolina, Oregon (see *Clayson's Will*, 24 Oreg. 542, 547), Rhode Island, Tennessee, and Virginia.

¹⁸ For instance, in Colorado: *Corrigan v. Jones*, 14 Colo. 311 (the estate consisting apparently in part of cattle ranches: p. 312); Connecticut: *Irwin's Appeal*, 33 Conn. 128, 140; Illinois: *Gardner v. Ladue*, 47 Ill. 211; Maine: *Lyon v. Ogden*, 85 Me. 374; Michigan: *Wilt v. Cutler*, 38 Mich. 189, 196; Minnesota: *Babeock v. Collins*, 60 Minn. 73 (leaving undecided the effect of a foreign probate where no notice thereof had been given: p. 78); Wisconsin: *Hayes v. Lienlokken*, 43 Wis. 509, 511.

¹⁹ *Clayson's Will*, 24 Oreg. 542, 547; *Lindley v. O'Reilly*, 50 N. J. L. 636; *Nelson v. Potter*, 50 N. J. L. 324; *Varner v. Bevil*, 17 Ala. 286; *St. James Church v. Walker*, 1 Del. Ch. 284; *Richards v. Miller*, 62 Ill. 417; *Sneed v. Ewing*, 5 J. J. Marsh. 460, 465; *Crusoe v. Butler*, 36 Mississippi, 150; *Davison's Will*, 1 Tuck. 479; *Hyman v. Gaskins*, 5 Ired. L.

probate of the foreign jurisdiction, duly authenticated, either according to the act of Congress, or in accordance with the regulations prescribed in the statutes of such States, are allowed to be given in evidence without probate anew, or previous approval by the probate court of the *loci rei sitæ*; ¹ it is so provided by statute in Florida, ² Georgia, ³ Illinois, ⁴ and in some other States the statute seems to provide only for a recording of a foreign will. ⁵ The authentication of the probate, and certificate that such authentication is in due form of law in the State granting it, in the manner prescribed by the act of Congress for the authentication of records, is sufficient to entitle such will to admission in the courts of sister States without proof of the statute giving jurisdiction to the foreign court. ⁶

There is some deviation, also, on the validity of wills executed * in a State or country, according to the requirements [* 495] thereof, in which the testator was not domiciled at the time of his death, as to personal property situated in the State of his domicile, or some other country. Thus, a will made in Massachusetts by an inhabitant thereof

267; *Holman v. Hopkins*, 27 Tex. 38; *McCormick v. Sullivant*, 10 Wheat. 192; *Pennell v. Weyant*, 2 Harr. 501, 506; *Budd v. Brooke*, 3 Gill, 198, 232; *Barstow v. Sprague*, 40 N. H. 27, 31; *Goodman v. Winter*, 64 Ala. 410, 428; *Williams v. Jones*, 14 Bush, 418; *Smith v. Neilson*, 13 Lea, 461, 466.

¹ *Harris v. Anderson*, 9 Humph. 779; *Lancaster v. McBryde*, 5 Ired. L. 421, 423, citing *Helme v. Sanders*, 3 Hawks, 563 (but compare on this point the later case of *Drake v. Merrill*, 2 Jones L. 368, which seems to overrule the last two cases); *Shephard v. Curriel*, 19 Ill. 313, 319; *Newman v. Willetts*, 52 Ill. 98, 104; *Walton v. Hall*, 66 Vt. 455; *Smith v. Neilson*, 13 Lea, 461, 466; *Lewis v. City of St. Louis*, 69 Mo. 595, affirmed in *Bradstreet v. Kinsella*, 76 Mo. 63, 66; *Gaines v. Fender*, 82 Mo. 497, 505; and *Drake v. Curtis*, 88 Mo. 644.

² Rev. St. 1892, § 1110. But unless the execution of the will conforms to the law of Florida, it is not sufficient to pass real estate: *Crolley v. Clark*, 20 Fla. 849.

³ Code, 1895, § 3291.

⁴ *Long v. Patton*, 154 U. S. 573; *St. & C. Ann. St. 1896*, ch. 148, ¶ 10.

⁵ In Missouri such a statute was held to authorize a will proved in another State, in accordance with the law of Mis-

souri, an authenticated copy of which was recorded in the proper county of the latter State, to be competent evidence of title: *Applegate v. Smith*, 31 Mo. 166, 169; *Bright v. White*, 8 Mo. 421, 426; *Haile v. Hill*, 13 Mo. 612, 618. So in other States; *Bromley v. Miller*, 2 Th. & C. 575; *Carpenter v. Denoon*, 29 Oh. St. 379, 395. But it is also held in Missouri, that while a foreign will need not be probated anew if complying with the Missouri law, yet it must be recorded in the latter State as domestic wills are required to be recorded, in order to give constructive notice to persons dealing with lands in this State: *Keith v. Keith*, 97 Mo. 223, 229; *Van Syckel v. Beam*, 110 Mo. 589; and see, also, *Slayton v. Singleton*, 72 Tex. 209, 212. And it was held in the United States Circuit Court, District for Kansas, that a conveyance by a foreign executor, before complying with the Kansas law as to the probate of the will, was validated by the doctrine of relation, by a subsequent compliance with the law, no rights of third persons having intervened: *Brooks v. McComb*, 38 Fed. R. 317.

⁶ *Puryear v. Beard*, 14 Ala. 121, 128; *Robertson v. Barbour*, 6 T. B. Mon. 523, 528; *Wilt v. Cutler*, 38 Mich. 189, 198; and see cases, *supra*, note 1.

must be proved according to the law of Massachusetts, no matter where it receives original probate;¹ and a will is admissible to original probate in the jurisdiction of the testator's domicile at the time of his death, without regard to where he died or where the will was made.² While a foreign will may be admitted to probate upon proper proof, although it has not been proved or recorded in the testator's domicile,³ and although it has been declared void in other States,⁴ the probate of a court which is without jurisdiction because the testator may have resided, but was not domiciled, in the State, is void, and cannot support a probate in the State of the domicile.⁵ And it has been held that the proof must be in accordance with the law of the domicile at the time of death, although the statute provides that property may be bequeathed if the will be executed and proved "according to the laws of this State, or of the country, State, or Territory in which the will shall be made."⁶

Probate of foreign will which has not been admitted to probate at the testator's domicile, or has been rejected in some State.

[* 496] *The rule requiring the validity of a will affecting personal property to be tested by the law of the testator's domicile does not extend to the execution or construction of a power of appointment by will; the law of the dom-

Law governing power of appointment.

¹ Pub. St. 1882, p. 749. So in New Jersey: *Wallace v. Wallace*, 3 N. J. Eq. 616; Mississippi: *Bate v. Incisa*, 59 Miss. 513, 517, citing numerous Mississippi cases.

² *Converse v. Starr*, 23 Oh. St. 491.

³ *Varner v. Bevil*, 17 Ala. 286; *Hyman v. Gaskins*, 5 Ired. L. 267; *Jaques v. Horton*, 76 Ala. 238; *Booth v. Timoney*, 3 Dem. 416; *Gordon's Case*, 50 N. J. Eq. 397.

⁴ *Rice v. Jones*, 4 Call, 89.

⁵ *Stark v. Parker*, 56 N. H. 481, 485; *Desesbats v. Berquier*, 1 Binn. 336 (in which *Yeates, J.*, p. 347, cites *Vattel*, 154, § 85; 2 *Huberus*, lib. 1, tit. 3; 2 *Wolfe*, 201; *Denizart*, 515; *Target*, and *Lord Kaimes*, as severally asserting that the validity of a testament as to its form can only be decided by the judge of the domicile, whose sentence delivered in form ought to be everywhere acknowledged); *Caulfield v. Sullivan*, 85 N. Y. 153, 159; *Manuel v. Manuel*, 13 Oh. St. 458, 463, citing numerous authorities; *Morris v. Morris*, 27 Miss. 847; *Moultrie v. Hunt*, 23 N. Y. 394; *Grattan v. Appleton*, 3 *Story*, 755, 764; *Dupuy v. Wurz*, 53 N. Y. 556, 560; and the rule is the same if the testator, having made a will in accord-

ance with the law of his domicile, subsequently changes his residence and acquires a new domicile in another State,—the will becomes void, unless it conform to the law of his last domicile: *Story, Conf. L.* § 473; *Schoul. Ex.* § 17; 1 *Redf. Wills*, p. 401, pl. 12.

Mr. Wharton, mentioning the English statute of 24 & 25 Vict. c. 107, providing that a will validly executed at an actual domicile is not affected by a subsequent change of domicile, says that "this amendment of the law has been adopted generally in the United States" (*Wh. Conf. L.* § 586), citing 1 *Redf.* (3d ed.) 381, *Coffin v. Otis*, 11 Met. (Mass.) 156, and *Manuel v. Manuel*, 13 Oh. St. 458. These authorities do not, however, seem to warrant the statement.

⁶ Such is the statutory provision in several States, among them in Missouri. Yet it was here held, in the face of this statute, that a will made in another State by a person then a resident of such State, but who afterwards removes to this State, and dies a resident of this State, is invalid, if not made according to the laws of this State: *Nat v. Coons*, 10 Mo. 543, 546; *Stewart v. Pettus*, 10 Mo. 755.

icil of the donor of the power and not of the testator governs in such case.¹

The provision of the Constitution of the United States requiring full faith and credit to be given in each State to the public acts, records, and judicial proceedings of every other State, and the act of Congress relating thereto, do not give such acts, records, or proceedings any greater force and efficacy in the courts of other States than they possess in the States from which they are taken, and apply only so far as such courts have jurisdiction.² Hence while the judgment of a court admitting a will to probate is binding on the courts of every State in respect of all property under its jurisdiction, whether real or personal, yet it establishes nothing beyond that, and does not take the place of the necessary formalities to make the will valid in respect of real property in other States, if wanting.³

A late case decided in Connecticut holds that, where probate was granted in New York of a will invalid in Connecticut, but valid in New York, such probate was binding upon the courts of Connecticut, although a probate court in Connecticut had previously decided, under circumstances giving it jurisdiction, that the testatrix had died domiciled in Connecticut, and had appointed an administrator.⁴

§ 227. **Revocation of Probate ; Contest of Probate.** — The power to revoke probate of a will is exercised by English courts of chancery in cases where it is clear that probate courts are powerless to afford adequate relief against injury in consequence of fraud or perjury committed in obtaining the probate. But in the United States there is no such power in *chancery, except as pointed out by statute [* 497] in some of the States. "Wherever the power to probate a will is given to a probate or surrogate's court, the decree of such court is final and conclusive, and not subject, except on an appeal to a higher court, to be questioned in any other court, or to be set aside or vacated by the court of chancery on any ground."⁵ This language is quoted and approved by Justice Bradley of the Supreme Court of the United States,⁶ and received

Revocation in England by courts of chancery.

Otherwise in the United States.

¹ Bingham's Appeal, 64 Pa. St. 345 ; Sewall v. Wilmer, 132 Mass. 131, citing English cases ; Blount v. Walker, 28 S. C. 545 ; Walton v. Hall, 66 Vt. 455, 461 (holding probate of a will in a State of ancillary jurisdiction of no effect to pass personality in Vermont where the testator was domiciled) ; 1 Jarm. * 29.

² Suydam v. Barber, 18 N. Y. 468, 472 ; Public Works v. Columbia College, 17 Wall. 521, 529 ; Robertson v. Pickrell, 109 U. S. 608.

³ Robertson v. Pickrell, 109 U. S. 608, 610 ; McCormick v. Sullivant, 10 Wheat. 192, 202 ; Darby v. Mayer, 10 Wheat. 465, 469 ; McCartney v. Osburn, 118 Ill. 403, 410 ; Osburn v. McCartney, 121 Ill. 408, 411 ; Nelson v. Potter, 50 N. J. L. 324 ; Keith v. Keith, 97 Mo. 223, 229.

⁴ Willet's Appeal, 50 Conn. 330.

⁵ State v. McGlynn, 20 Cal. 233, 268.

⁶ In Broderick's Will, 21 Wall. 503.

the unanimous assent of the whole court, save that Judges Clifford and Davis qualified it to the extent of claiming jurisdiction for chancery courts in cases where there is no adequate remedy in the probate court for a party injured by perjury or fraud. Judge Story, the stanch vindicator of the most comprehensive chancery powers, says that there is but one exception to the concurrent jurisdiction of chancery courts in all matters of fraud, which is fraud in obtaining probate of a will; and he finds it "not easy to discern the grounds upon which this exception stands in point of reason or principle, although it is clearly settled by authority."¹ The common-law rule is stated to be that the remedy for fraud in obtaining a will is exclusively vested, in wills of personalty, in the ecclesiastical courts; and in wills of real estate, in the courts of common law.²

The power to revoke exists, however, in the probate court itself, in all cases where the court acted without jurisdiction, without notice, where the statute requires notice, or in disregard of some statutory requirement, so that the decree or judgment rendered is void;³ and so where a later will is discovered

Power to vacate probate in probate court.

subsequently to the probate of an earlier one, [* 498] there is no doubt of the power of the probate court to * establish the later will.⁴ But where a will has been conclusively

¹ Story, Eq. Jur. § 440. Among the cases so holding, see *Gaines v. Chew*, 2 How. (U. S.) 619; *Ellis v. Davis*, 109 U. S. 485; *Tarver v. Tarver*, 9 Pet. 174, 180; *Luther v. Luther*, 122 Ill. 558, 565; *Langdon v. Blackburn*, 109 Cal. 19; *Ewell v. Tidwell*, 20 Ark. 136, 141; *Townsend v. Townsend*, 4 Coldw. 70, 80; *Slade v. Street*, 27 Ga. 17; *Booth v. Kitchen*, 7 Hun, 255, 259; *Walters v. Ratliff*, 5 Bush, 575; *McDowell v. Peyton*, 2 Desaus. 313, 320 (decreeing that the defendants consent to a revocation of the probate, to enable the ordinary to try the will *de novo*; an expedient also resorted to in *Palmer v. Mikel*, 2 Desaus. 342); *Howell v. Whitechurch*, 4 Hayw. 49; *Burrow v. Ragland*, 6 Humph. 481, 484; *Lyne v. Guardian*, 1 Mo. 410; *Garland v. Smith*, 127 Mo. 583; *Stowe v. Stowe*, 140 Mo. 594, 602; *Colton v. Ross*, 2 Paige, 396, 398; *Wells v. Stearns*, 35 Hun, 323. In Tennessee a court of equity will set aside a judgment rejecting a will in solemn form, obtained by collusion or fraud, and if the will had already been probated in common form, reinstate such probate: *Smith v. Harrison*, 2 Heisk. 230, 242. See also that equity has power to set aside a probate for fraud: *Post v. Mason*, 26 Hun (N. Y.), 187.

² Story, Eq. Jur. § 184.

³ *Waters v. Stickney*, 12 Allen, 1, 9, *et seq.*; *Lawrence's Will*, 7 N. J. Eq. 215, 221; *Roy v. Segrist*, 19 Ala. 810, 813; *Sowell v. Sowell*, 40 Ala. 243, 245.

⁴ *Per Gray, J.*, in *Waters v. Stickney*, 12 Allen, 1, 11: "A court of probate has no more power by a decree establishing one testamentary instrument to preclude the subsequent probate of a later one never before brought to its notice, than by a decree approving one account to discharge an administrator from responsibility for assets not actually accounted for." This point was commented on by Justice Wayne in *Gaines v. Hennen*, 24 How. 553, 567: "Courts of probate may for cause recall or annul testamentary letters, but they can neither destroy nor revoke wills; though they may and often have declared that a posterior will of a testator shall be recognized in the place of a prior will which had been proved, when it was not known to the court that the testator had revoked it." To the like effect, *Bowen v. Johnson*, 5 R. I. 112, 119; *Campbell v. Logan*, 2 Bradf. 90, 92; *Schultz v. Schultz*, 10 Gratt. 358, 373; *Vance v. Upson*, 64 Tex. 266, 269. But it is held in some States that the propound-

established, the production of a later will for probate, not in terms revoking the former, does not raise the question of revocation, and such revocation cannot be determined in such proceeding if there is room for dispute as to construction. The probate of the former will should be left to stand for what it is worth, and its effect decided elsewhere.¹ It has been held that no lapse of time will bar an application for the revocation of the invalid probate of a will, in the court which granted it;² but unless the power to review or revoke is conferred by statute, no merely erroneous probate can be set aside by the probate court after the term at which it was granted has expired.³ In Vermont, however, probate courts have, as one of their "incidental and unnamed powers necessary to enable them to work out justice in the exercise of their jurisdiction," the power to vacate a decree allowing probate, where the estate is still undisturbed.⁴

In most States, however, the revocation of probates is regulated by the statutory provisions concerning the probate, as will appear from the consideration of this subject in the opening sections of this chapter.⁵ It may be assumed that, with the exception of a few of the States in which the probate of a will in the common form, or *ex parte*, is not conclusive as to real estate devised, no probate, decreed by a court having jurisdiction of probates, is impeachable collaterally; to annul, set aside, or revoke such probate, there must be a direct proceeding to that end upon notice to all parties interested.⁶ This may be by appeal from the decree establishing *or [* 499] rejecting the probate, by any person interested in the will,⁷

ing of a codicil is a contest *pro tanto*, and can be treated as such only: *Estate of Adsit*, Myr. 266; *Hardy v. Hardy*, 26 Ala. 524; *Watson v. Turner*, 89 Ala. 220.

¹ *Besançon v. Brownson*, 39 Mich. 388.

² *Clagett v. Hawkins*, 11 Md. 381, 387; to the same effect, *Bailey v. Osborn*, 33 Miss. 128.

³ *McCarty v. McCarty*, 8 Bush, 504, 506; *Corby v. Judge*, 96 Mich. 11.

⁴ *Hotchkiss v. Ladd*, 62 Vt. 209.

⁵ *Ante*, § 215.

⁶ *Castro v. Richardson*, 18 Cal. 478; *Goldtree v. McAlister*, 86 Cal. 93; *In re Whetton*, 93 Cal. 203; *Taylor v. Tibbatts*, 13 B. Mon. 177, 181, citing *Well's Will*, 5 Litt. 273; *Cochran v. Young*, 104 Pa. St. 333; *Roberts v. Flanagan*, 21 Neb. 503; *Kirk v. Bowling*, 20 Neb. 260; *Dower v. Seeds*, 28 W. Va. 113, 143; *Winslow v. Donnelly*, 119 Ind. 565 (where the will had been probated in a foreign State and

was attacked collaterally for fraud); *Sullivan v. Rabb*, 86 Ala. 433 (in which a will had been probated in which there was but one attesting witness, the statute requiring two); *Whitman v. Haywood*, 77 Tex. 557. Upon the contest of a will the proceedings become *inter partes* in many respects, i. e. the necessity of notice to parties in interest: see notes *infra*, especially p. * 500, and cases there cited.

⁷ *Northampton v. Smith*, 11 Met. (Mass.) 390, 393, recognizing the right to appeal in a corporation to which the legal title to a fund was devised to be held in trust, although payable at a future and distant day; *Cheever v. Judge*, 45 Mich. 6; *Howe v. Pratt*, 11 Vt. 255; *Scribner v. Williams*, 1 Pai. 550; *Newhouse v. Gale*, 1 Redf. 217; *Havelick v. Havelick*, 18 Iowa, 414; *Will of Alexander*, 27 N. J. Eq. 463; *Buckingham's Appeal*, 57 Conn. 544 (allowing a legatee

but which, since the right thereto is purely statutory, must be pursued in strict compliance with the requirements of the statute;¹ or it may be by contest, which any interested person may institute who was not a party to the original proceeding resulting in the probate or rejection of the will,² either in the court which granted the probate,³ or in a superior court of law,⁴ or in a court of chancery,⁵ as may be provided by the statute.⁶ These proceedings are in most instances limited to a given period of time after which the probate becomes absolutely conclusive.⁷ * Another form in which the probate

Contest.

Limitation.

under a prior will to appeal from a decree allowing a later will; *Lawrie v. Lawrie*, 39 Kans. 480 (allowing appeal from an order refusing probate); *Preston v. Trust Co.*, 94 Ky. 295 (appeal from refusal to probate); *Missionary Soc. v. Ely*, 56 Oh. St. 405 (appeal from refusal to probate); on appeal, in some States the presumption is in favor of the probate; *Rollwagen v. Rollwagen*, 3 Hun, 121, 128; *Estate of Sticknoth*, 7 Nev. 223, 228.

¹ *Dennison v. Talmage*, 29 Oh. St. 433.

² *Worthington v. Gittings*, 56 Md. 542, 547; *Gregg v. Myatt*, 78 Iowa, 703; *Cunningham's Estate*, 54 Cal. 556; *Bailey v. Stewart*, 2 Redf. 212, 224; the fact that an heir who was not made a party appears as a witness does not estop him from subsequently instituting proceedings to set aside the will; *Miller's Estate*, 159 Pa. St. 562. In New York even one who was a party to the original proceeding may contest the probate, and try again the very questions litigated: *Gourand's Will*, 95 N. Y. 256; *Re Soule*, 1 Connolly, 18, 52. A creditor of the testator cannot invoke the power to revoke probate of a will: *Heilman v. Jones*, 5 Redf. 398; *State National Bank v. Evans*, 32 La. An. 464; *Montgomery v. Foster*, 91 Ala. 613; nor a purchaser after the probate of the will, but only those interested at the time of the probate: *McDonald v. White*, 130 Ill. 493; nor the creditor of a disinherited heir: *Shepard's Estate*, 170 Pa. St. 323; nor one incapacitated to take a devise by reason of alienage: *Jele v. Lemberger*, 163 Ill. 338. In California, where the statute saves to minors one year after removal of disability to contest the validity of a will, it is held that probate is not conclusive upon a minor, where there has been no contest, although citation had

been served upon him, and an attorney appointed to represent him in the probate: *Samson v. Samson*, 64 Cal. 327.

³ *Estate of Rice*, Myr. 183; *Hubbard v. Hubbard*, 7 Oreg. 42, 44; *Miller v. Miller*, 5 Heisk. 723, 727; *Will of Kellum*, 50 N. Y. 298; *Matter of Paige*, 62 Barb. 476; *Dickenson v. Stewart*, 1 Murph. 99; *Brown v. Gibson*, 1 Nott & McC. 326 (according to the common law at any time within thirty years).

⁴ *Leighton v. Orr*, 44 Iowa, 679, 682; *Kelsey v. Kelsey*, 57 Iowa, 383.

⁵ *Johnston v. Glascock*, 2 Ala. 218, 233; *Lyons v. Campbell*, 88 Ala. 462; *Knox v. Paull*, 95 Ala. 505; *McCall v. Vallandigham*, 9 B. Mon. 449. But one who has appeared to the original probate and unsuccessfully prosecuted an appeal therefrom, cannot thereafter file a bill in chancery to contest the will: *Dale v. Hays*, 14 B. Mon. 315, 317; unless he withdraws before the order admitting the will to probate is made: *Dillard v. Dillard*, 78 Va. 208. The proceeding in chancery is held to be binding only on the parties to the suit, being void as to all others: see *infra*, p. * 500 on this point.

⁶ *Ante*, § 215. In Indiana a contest may be instituted before or after the instrument is admitted to probate: *Curry v. Bratney*, 29 Ind. 195. In Kentucky the probate can only be set aside by appeal to a higher court; but an original bill in equity to set aside the probate of a will is allowed upon grounds which would give equity jurisdiction over any other judgment at law, or to non-residents who were not parties to the original proceeding: *Hughey v. Sidwell*, 18 B. Mon. 259.

⁷ *Matter of Becker*, 28 Hun, 207; *Post v. Mason*, 26 Hun, 187; *Sbarboro's Estate*

of a will may be controlled is by the right recognized in some States in the next of kin to demand the establishment of a will in solemn form which had been admitted to probate in common form.¹ This method does not commend itself as a wise or just rule, and meets with little favor from courts.²

The original *ex parte* probate is a proceeding *in rem*;³ but on a contest, "whenever a controversy in a suit between the parties arises respecting the validity of the will," it becomes in some respects *inter partes*,⁴ requiring notice to all parties in interest,⁵ although in gen-

63 Cal. 5; the time limited is jurisdictional, and if the jurisdictional facts are not alleged in the bill, demurrer will lie: *Wheeler v. Wheeler*, 134 Ill. 522. See also *Sinnet v. Bowman*, 151 Ill. 146. In Louisiana the prescription of five years bars nullities of form in the probate: *Porter v. Hornsby*, 32 La. An. 337. It is sufficient, however, if the proceedings be commenced within the time: *Stewart v. Harriman*, 56 N. H. 25; and if commenced in time, amendments may be made, and other necessary parties thereafter added, although the statutory period had elapsed: *Lilly v. Tobbein*, 103 Mo. 477; *San Francisco O. A. v. Superior Court*, 116 Cal. 443; *Bradford v. Andrews*, 20 Ohio St. 208; *Miller's Estate*, 166 Pa. St. 97; *Stewart v. Harriman*, 56 N. H. 25. But in California it is held that amendments after the time to contest cannot be permitted which constitute other and independent grounds of contest: *In re Wilson*, 117 Cal. 262, 268. Where by the statute time is given, in addition to the period of limitation, after the discovery of fraud or forgery, to contest a will, the contestant must show due diligence, or he will be barred: *Ransome v. Bearden*, 50 Tex. 119, 127. And unless the statute so provides the time within which contest of the will is allowed is not extended by disability or fraud: see numerous cases cited in *Bartlett v. Manor*, 146 Ind. 621, 627; *Stowe v. Stowe*, 140 Mo. 594.

¹ In South Carolina this right is limited to four years: *Craig v. Beatty*, 11 S. C. 375, 379, citing *Kinard v. Riddlehoover*, 3 Rich. 258. In Georgia, to seven years: *Vance v. Crawford*, 4 Ga. 445, 457; *Howell v. Whitechurch*, 4 Hayw. 49. Contesting probate in common form by counsel for the heirs, but without their knowledge or consent, is held not to waive

their right to probate in solemn form: *Gray v. Gray*, 60 N. H. 28.

² Lumpkin, J., of the Supreme Court of Georgia, in *Walker v. Perryman*, 23 Ga. 309, 317, says, in an earnest appeal to the legislature to abolish the double probate of wills: "The expense of attending the re-probate of wills, in Georgia, since I have been on the bench, has cost the public more than its Supreme Court. And this is not all. A part of the heirs and legatees occupying the same status precisely toward the litigation and its subject-matter fail, and a part recover! A mischief so patent should not be tolerated."

³ See on the original probate in the probate court, *ante*, §§ 215 *et seq.* That such proceeding is *in rem* and binding on all persons, whether made parties or not, see: *Bonnemort v. Gill*, 167 Mass. 338, 340; *Johnes v. Jackson*, 67 Conn. 81, 90; *Woodruff v. Taylor*, 20 Vt. 65; *Broderick's Will*, 21 Wall. 503, 509, 518, 519; and see *Rice v. Hasking*, 105 Mich. 303.

⁴ *Bradford v. Andrews*, 20 Oh. St. 208, 222; in so far, for instance, as to determine the competency of witnesses as parties: *Valentine's Will*, 93 Wis. 45, 50, (see cases on this point *pro* and *con*, cited, *ante*, § 219, p. *477); or to give the federal courts jurisdiction on the ground of diverse citizenship of the parties: *Gaines v. Fuentes*, 92 U. S. 10, 21 (three judges dissenting) and see cases so holding cited *ante*, § 156, p. *357, note.

⁵ And hence in some States persons not made parties are not bound by the decree: *McArthur v. Scott*, 113 U. S. 340, 387, following *Holt v. Lamb*, 17 Oh. St. 374, as the law of Ohio; *Miller's Estate*, 159 Pa. St. 562; and where a minor is a party in interest, a guardian *ad litem* must be appointed, else he will not be bound:

eral the proceedings are held to remain *in rem*,¹ the issue being will or no will; and though such contest may be in the nature of an appeal and trial *de novo*,² and be an action at law, partaking, in some respects, of a proceeding in equity,³ yet the court must proceed either to establish or reject the will; hence the contestant cannot be permitted to dismiss or to take a voluntary non-suit;⁴ nor, for the same reason, can contestant be compelled to give security for costs;⁵ nor can the issue be varied or restricted by averments in the pleadings or by the consent or acquiescence of the parties;⁶ so also when a will is annulled at the instance of one in whose favor a longer time is allowed to make contest by reason of his having been under disability, the will must be set aside as an entirety, and the action enures to the benefit of all others interested, though as to them the time within which the will could be attacked had elapsed;⁷ but on this point the contrary has also been held.⁸

The proceeding must be conducted to a final determination of will or no will.

The probate cannot be revoked as to some and not as to others; hence a judgment entered in pursuance of a stipulation of the parties

Wells v. Wells, 144 Mo. 198, 261, holding also that the contest is in the nature of an action of probate in solemn form, when all parties in interest are required to be brought into court before its right to try the statutory issue is exercised, and the defect of parties may be taken advantage of at any time, even on appeal. So on contest or proof in solemn form, all persons interested either under or against the will must be made parties in the statutory method: Crew v. Pratte, 119 Cal. 139. The executor should generally be made a party to such a proceeding: *In re Whetton*, 93 Cal. 203; *Bardell v. Brady*, 172 Ill. 420; and see cases cited *post*, § 517, as to the executor's rights on will contests.

¹ *Benoist v. Murrin*, 48 Mo. 48; *Harris v. Hays*, 53 Mo. 90, 93; *San Francisco O. A. v. Superior Court*, 116 Cal. 443, 453; and hence binding on all persons, whether made parties or not, if the court have jurisdiction: *Hazel v. Taylor*, 1 Head, 594.

² *Norton v. Paxton*, 110 Mo. 456, 461; *Hughes v. Burris*, 85 Mo. 660; as to whether such contest is by appeal or by original action, see also *ante*, § 215.

³ *Garland v. Smith*, 127 Mo. 567, 580, also holding that the appellate court will not disturb the verdict of the jury on the ground that the verdict is against the mere weight of the evidence; *Bryant v. Pierce*, 95 Wis. 331, holding the verdict of the

jury to have substantially merely the advisory effect of a feigned issue in chancery, and that the court would not reverse, although in some cases exceptions were well taken to rulings on the evidence. Where the evidence is such that the court would not sustain a verdict upon it, the issue should not be submitted to the jury: *Herster v. Herster*, 122 Pa. St. 239, 264, and cases cited; *McFadin v. Catron*, 138 Mo. 197; *In re Kaufman*, 117 Cal. 288; the rule in will contests, as to upholding the verdict of the jury, is the same as in other cases: *In re Wilson*, 117 Cal. 262, 269; *Harp v. Parr*, 168 Ill. 459, 481. See also as to the effect to be given to the jury's verdict, *ante*, § 23, p. *81, last note.

⁴ *McMahon v. McMahon*, 100 Mo. 97; *Hutton v. Sawyer*, 104 N. C. 1; but in New York, if all the parties are *sui juris*, it seems they can control the disposition of the case: *Lasak's Will*, 131 N. Y. 624; see also *Hazel v. Taylor*, 1 Head, 594.

⁵ *Cash v. Lust*, 142 Mo. 630, 637.

⁶ *Dew v. Reid*, 52 Oh. St. 519, 524. It is held that the issue is made up upon the filing of the *caveat* and that no answer at all is necessary: *Crenshaw v. Johnson*, 120 N. C. 270, 272. As to permitting of amendments, see *supra*, p. *499, last note.

⁷ *Powell v. Kochler*, 52 Oh. St. 103, 118; see *Wells v. Wells*, 144 Mo. 198, citing earlier Missouri cases.

⁸ *Samson v. Samson*, 64 Cal. 327

Partial revocation disallowed. to the contest for the revocation, whereby the probate is annulled merely as to contestant, is void.¹ The contest of probate of the will may, however, be confined to a part of the will when such part only is attacked as having been made under undue influence, or obtained by fraud.²

The right to contest the validity of a probate granted in the method pointed out by the statute may be exercised by any person

Any person who has a substantial interest in the will so established,³ interested may whether domestic or foreign.⁴ But since a person cannot contest probate. not hold under a will and also against it,⁵ one who

But not after himself from setting up a claim which will prevent its the will. full operation,⁶ at law or in equity;⁷ and such

* person will not, therefore, be allowed to contest a will, unless he return the legacy received.⁸ [* 501]

after the distribution of the estate, the decree of distribution is not

Revocation thereby made void, but it will protect and remain valid after distribution does not as to subsequent purchasers from the distributee;⁹ but avoid decree the heir may pursue the property distributed in the of distribution. hands of the distributee.¹⁰ So an executor and all who

deal with him on the faith of a will duly admitted to probate are protected for acts done before revocation of the probate,¹¹ although such will be subsequently annulled as a forgery.¹²

¹ *In re Freud*, 73 Cal. 555; and see *Wells v. Wells*, 144 Mo. 198.

² *Lyons v. Campbell*, 88 Ala. 462. But it has been held that if such part is inseparable from the whole will, and its evisceration would subvert the objects of the testator, such partial contest is not admissible: *Fisher v. Boyce*, 81 Md. 46, 51. See in connection herewith the subject of probate of wills in part, as treated *ante*, § 222.

³ See notes on previous page.

⁴ *Lynch v. Miller*, 54 Iowa, 516, 518; *a fortiori*, a foreign will, affecting lands in the State where it has not been admitted to probate, may be contested when offered as evidence in a suit of ejectment: *Pennel v. Weyant*, 2 Harring. 501. But in some States a foreign will duly authenticated and probated in the State of the forum cannot be contested in the latter at all. See notes to § 226, citing cases to this effect from Indiana, Alabama, and other States.

⁵ *Post*, § 461; *Smart v. Easley*, 5 J. J. Marsh. 214, 215; *Herbert v. Wren*, 7 Cr. 370, 378; *Preston v. Jones*, 9 Pa. St. 456, 459, citing *Whistler v. Webster*, 2 Ves. Jr. 367.

⁶ *Smith v. Guild*, 34 Me. 443, 447, citing *Thellusson v. Woodford*, 13 Ves. 209; *Hyde v. Baldwin*, 17 Pick. 303; *Weeks v. Patten*, 18 Me. 42; *Benedict v. Montgomery*, 7 Watts & S. 238, 243.

⁷ *Smith v. Smith*, 14 Gray, 532; *Van Dwyne v. Van Dwyne*, 14 N. J. Eq. 49, 52; *Fulton v. Moore*, 25 Pa. St. 468, 476.

⁸ *Miller's Appeal*, 159 Pa. St. 562; *Hamblett v. Hamblett*, 6 N. H. 333, 337, citing *Bell v. Armstrong*, 1 Add. 365; *Braham v. Burchell*, 3 Add. 243. See also *Matter of Soule*, 1 Connolly, 18, 54; *Matter of Peaslee*, 73 Hun, 113. But this rule does not apply to the executor, who may move to set aside a probate, although he has proceeded to act under the will: *Gaither v. Gaither*, 23 Ga. 521, 528. See also *post*, § 461, p. * 1017.

⁹ *Thompson v. Samson*, 64 Cal. 330; but see *Hughes v. Burris*, 85 Mo. 660.

¹⁰ *Thompson v. Samson*, *supra*.

¹¹ See as to the consequences of revocation of letters on mesne acts of the representative, *post*, §§ 266, 274.

¹² "Every person is bound by the judicial act of a court having competent authority; and during the existence of such judicial

§ 228. **Effect of the Probate.**—It has already appeared¹ that at common law, without the *constat* of the probate court, no other court can take notice of the rights of representation to personal property,² and that wills devising real estate must be proved in the common-law courts. By the statute of 20 & 21 Vict. c. 77, § 13, all wills, whether of real or personal property, are required to be proved in the court of probates. Similar statutes had long before existed in most of the American States, and the *constat* of the probate court is necessary to the validity of wills of personalty in all, and of wills of realty in most of them. In Arkansas,³ Florida,⁴ District of Columbia,⁵ Maryland,⁶ New York,⁷ Pennsylvania,⁸ and probably in other States, the probate of the probate court is neither essential nor conclusive as to the validity of wills in proving title to real estate: such will may be contested, if it has been admitted to probate in the probate court,⁹

English statute requiring probate of all wills before they take effect.

States allowing wills of real estate to be proved in common-law courts.

act the law will protect every person obeying it": Justice Ashhurst in *Allen v. Dundas*, 3 Term R. 125, 129. But payments prematurely made without an order of court, to the legatees, will not be allowed in favor of an executor under a will subsequently annulled: *Heffner's Succession*, 49 La. An. 407.

¹ *Ante*, § 215.

² Wms. Ex. [550].

³ *Janes v. Williams*, 31 Ark. 175, 182. And see *Arrington v. McLemore*, 33 Ark. 759, 761.

⁴ *Belton v. Summer*, 31 Fla. 139, the probate being conclusive as to personalty but *prima facie* valid as to realty.

⁵ *Campbell v. Porter*, 162 U. S. 478, 484; *Perry v. Sweeney*, 11 Dist. Col. App. 404.

⁶ *Darby v. Mayer*, 10 Wheat. 465, 470.

⁷ *Corly v. McElmeel*, 149 N. Y. 228; *Jackson v. LeGrange*, 19 Johns. 386, 388; *Upton v. Bernstein*, 76 Hun, 516, and cases cited. But in *Anderson v. Anderson*, 112 N. Y. 104, the court points out that it is the policy of that State to leave to probate courts all questions relating to the execution of a will and that only in special cases can a court of chancery interfere; and it was accordingly held, that a court of equity was without jurisdiction to probate a will, at least where no trusts were involved, on the application of a devisee of the real estate. Probate or rejection by the surrogate is conclusive as to person-

alty; probate is *prima facie* valid as to realty, but rejection is of no effect in other actions. See *ante*, § 215, p. *469, note.

⁸ *Smith v. Bonsall*, 5 Rawle, 80, citing numerous earlier cases. See *infra*, next note.

⁹ The decree of a register admitting a will to probate is held, in Pennsylvania, to be a judicial act, conclusive in all respects as to personal, and presumptive as to real property: *Cochran v. Young*, 104 Pa. St. 333, 336, citing earlier cases; and it must be contested by appropriate action within five years, or it becomes conclusive also as to realty: *Broe v. Boyle*, 108 Pa. St. 76, 82. The validity of probate in the probate court has been discussed heretofore: *ante*, § 215, p. *469; and the effect of revoking or annulling the probate upon mesne acts is discussed *post*, §§ 266 and 274. In New York (see note *ibid.*, *supra*) the probate or rejection is conclusive as to personalty, and the probate presumptive as to realty; but a rejection of probate does not even presumptively invalidate the will as to realty, when offered in evidence in an action where the title is involved: *Corley v. McElmeel*, *supra*. Says the court (p. 238): "Notwithstanding the extension of the limits of the surrogate's jurisdiction, we perceive no sufficient reason for departing from the former rule, which allowed those claiming under a will to set it up and to establish their title by common-law evidence, notwithstanding a

or proved originally if not, in all common-law courts in which the title to land thereby affected is in issue. With these ex-

ceptions, * however, neither courts of law nor [* 502] of equity will take cognizance of testamentary papers, or of the rights depending upon them, until after probate in the probate court.¹ That such probate is conclusive, unless appealed from, set aside, or annulled, in the method pointed out by the statute, has already been stated.² It may be mentioned, in connection with this subject, that the efflux of time, in some instances, operates to confirm a probate otherwise assailable for informality, or renders the probate conclusive after a certain period.³

It has already been remarked that it is the function of a court of probate to determine whether the instrument propounded has been executed by the testator and attested by the subscribing witnesses in accordance with the statutory requirements, and whether he possessed sufficient testamentary capacity to make a valid will.⁴ It is no part of the proceeding on probate to construe or interpret the will or any of its provisions, or to distinguish between valid and void, rational and impossible, dispositions; if the will be properly executed and proved, it must be admitted to probate, although it contain not a single provision capable of execution, or valid under the law. Hence the probate does not establish the validity of any of its provisions: this is

failure to have the will probated." (Bartlett, J., dissenting.)

¹ *Wood v. Matthews*, 53 Ala. 1, citing numerous earlier cases: *Pitts v. Melsner*, 72 Ind. 469, with a list of Indiana cases; *Kerr v. Moon*, 9 Wheat. 565, 572; *Ellis v. Davis*, 109 U. S. 485, 495; *Willamette Co. v. Gordon*, 6 Or. 175, 180; *Dublin v. Chadbourne*, 16 Mass. 433, 436; *Fotherree v. Lawrence*, 30 Miss. 416, 419; *State v. Judge, &c.*, 17 La. An. 189; *Rumph v. Hiatt*, 35 S. C. 444. In Louisiana a will is without effect until it is proved and ordered to be executed: *Aubert v. Aubert*, 6 La. An. 104; *Ochoa v. Miller*, 59 Tex. 460, citing earlier Texas cases, p. 461.

² *Ante*, § 227. Among the cases so holding, see *Hegarty's Appeal*, 75 Pa. St. 503, 513; *Hilliard v. Binford*, 10 Ala. 977, 983. Hence the powers of an executor under letters issued continue though there be a later will, until such later will receive probate: *Moss v. Lane*, 50 N. J. Eq. 295; *post*, §§ 266, 274.

³ *Dickey v. Vann*, 81 Ala. 425, 432. See also *Marshall v. Marshall*, 42 S. C. 436, 446. Thus, a will requiring two witnesses and attested by only one was held conclusively proved after the lapse of seven years. *Parker v. Brown*, 6 Gratt. 554. So where three were required, proof by two was held sufficient after twenty years: *Brown v. Wood*, 17 Mass. 68. In Pennsylvania the probate becomes conclusive as to real estate after five years: *Kenyon v. Stewart*, 44 Pa. St. 179. Where notice of probate is required by statute, the omission in the record of proof of such notice was not allowed to be shown in derogation of the probate fifteen years subsequently: *Portz v. Schantz*, 36 N. W. Rep. (Wis.) 249, 253; s. c. 70 Wis. 497.

⁴ *Ante*, § 222, and authorities there cited; *McLaughlin's Will*, Tuck. 79; *Lorieux v. Keller*, 5 Iowa, 196, 201; *Emmons v. Garrett*, 7 Mackey, 53.

to be determined by the courts of construction, when any question arises requiring their interposition.¹

¹ *Cox v. Cox*, 101 Mo. 168 (overruling *Kenrick v. Cole*, 61 Mo. 572), p. 172; *Lilly v. Tobbein*, 103 Mo. 477, 487; *Bent's Appeal*, 35 Conn. 523; *Lusk v. Lewis*, 32 Miss. 297, 300; *Waters v. Cullen*, 2 Bradf. 354; *Jalliffe v. Fanning*, 10 Rich. L. 186; *Broe v. Boyle*, 108 Pa. St. 76, 83; *McArthur v. Scott*, 113 U. S. 340, 386; *Murphy's Estate*, 104 Cal. 554; *Sumner v. Crane*, 155 Mass. 483. And of course on appeal the appellate court has no greater right: *Graham v. Burch*, 47 Minn. 171, 176.

* CHAPTER XXV.

[* 503]

OF THE GRANT OF LETTERS TESTAMENTARY.

§ 229. **How the Executor is constituted.**—Upon probate of the will, letters testamentary may be granted to such of the executors named by the testator as are willing to assume the trust.¹ The court has no discretion in this respect, but must grant the letters to the person or persons nominated, unless such person is disqualified by law.² One named as executor is entitled to letters testamentary, although the will contain no other provision of any kind,³ and an executor has power generally to administer all the personal property of the deceased, although the testator die intestate as to a portion thereof.⁴ There need be no appointment by the testator in direct terms; it is sufficient if a person is designated to discharge those duties which appertain to the office of executor, or that any language is used from which the intention of the testator may be inferred to invest such person with the character of executor.⁵ He may also delegate the appointment of an executor to some third person, and letters testamentary will be granted to the person by him named.⁶ But the grant of letters testamentary to a person not named or indicated by the testator is erroneous, and has in South Carolina been held void.⁷

¹ The grant of *general* letters of administration, instead of letters *cum testamento annexo*, has been held void; *Fields v. Carlton*, 75 Ga. 554, 560.

² *Holladay v. Holladay*, 16 Oreg. 147; *In re Banquier*, 88 Cal. 302, 309, and cases cited; *Terry's Appeal*, 67 Conn. 181, holding that the appointment of an administrator with the will annexed at the same time with the executor was simply void.

³ *In re Hickman*, 101 Cal. 609.

⁴ *Matter of Murphy*, 144 N. Y. 557; *Landers v. Stone*, 45 Ind. 404; *Venable v. Mitchell*, 29 Ga. 556.

⁵ *Carpenter v. Cameron*, 7 Watts, 51, 58; *Wolfe v. Loeb*, 98 Ala. 426; *Grant v. Spann*, 34 Miss. 294, 302; *Nunn v. Owens*, 2 Strobb. 101, 104; *Bayeaux v. Bayeaux*, 8 Pai. 333, 336; *Ex parte Me-*

Donnell, 2 Bradf. 32; *Myers v. Daviess*, 10 B. Mon. 394; *State v. Watson*, 2 Speers, 97, 106.

⁶ *Bishop v. Bishop*, 56 Conn. 208; *Hartnett v. Wandell*, 60 N. Y. 346; *State v. Rogers*, 1 Houst. 569; *Jackson v. Paulet*, 2 Robert. Eccl. 344. So the testator may empower the survivor or survivors, in case of the death of any of the executors, to appoint other executors to fill any such places as may be made vacant by death, until the will shall have been wholly executed, and such appointees will be clothed with the trust estate in the place of their predecessors: *Mulford v. Mulford*, 42 N. J. Eq. 68, 76.

⁷ *Blakely v. Frazier*, 20 S. C. 144, 155; see also *Fields v. Carlton*, *supra*.

The test of a constructive appointment as executor, or of an executor according to the tenor of the will, may be found by considering whether the acts to be done or the powers to be exercised by the person are such as pertain to the

Instances of
constructive
appointment
of executor.

office of an executor. Thus, the testator's declaration [* 504] "that A. B. shall have his goods after

his death to pay his debts, and otherwise to dispose at his pleasure," and the like expressions,¹ may suffice for this purpose. So too the commitment of one's property to "the disposition" of A. B.;² or the direction that A. B. shall pay debts and funeral and probate charges, or shall receive the property and pay the legacies;³ or the gift to A. B. of all one's property, to apply the same "after payment of debts" to the payment of legacies.⁴ The appointment to a trust under the will, not essential to the office of an executor, does not constitute the trustee an executor according to the tenor, for the offices of an executor and of a trustee are distinct, and may be vested in different persons, and when they are vested in the same person, the functions of each are nevertheless to be performed by him in the respective capacity, the probate court having jurisdiction over him in the one, but not in the other capacity;⁵ and an administrator *de bonis non cum testamento annexo*, appointed after the death of an executor who was also appointed trustee in the will, does not *virtute officii* succeed to the trust.⁶ But where the testator uses the word "trustee," and imposes duties involving the functions of an executor, this will be held a good appointment as executor.⁷

As a testator may nominate several executors to execute his will jointly, so he may direct a substitution of several, one after the other, so that, if the first will not act, the next may, and so on.⁸ And so he may provide that upon the death of his executor another shall complete the administration, in which case the successor upon his appointment possesses all the powers of, and is, an executor, and not an administrator *de bonis non*.⁹ It is mentioned by Williams,¹⁰

¹ Wms. Ex. [239]; Schouler, Ex. § 36. Both these authors cite *Henfrey v. Henfrey* as authority for this announcement; but the case, as reported in 4 Moore's P. C. Reports, pp. 29, 33, does not seem to raise this question.

² *Pemberton v. Cony*, Cro. Eliz. 164.

³ *Pickering v. Towers*, 2 Cas. Temp. Lee, 401.

⁴ *Goods of Bell*, L. R. 4 P. D. 85. And see cases *supra*.

⁵ *Wheatley v. Badger*, 7 Pa. St. 459. See *Matter of Hawley*, 104 N. Y. 250, 263; *Creamer v. Holbrook*, 99 Ala. 52. And this though the one to whom purely trust powers are given is styled "execu-

tor" by the testator: *Smith v. Smith*, 15 Wash. 239. As to the jurisdiction of the probate court over testamentary trusts and trustees, see further *ante*, § 151, p. * 346; and as to the rights and duties of one who is at the same time trustee and executor, see *post*, § 340, p. * 721.

⁶ *Knight v. Loomis*, 30 Me. 204; to similar effect, *Simpson v. Cook*, 24 Minn. 180, 187. On this point see *post*, § 340, p. * 721.

⁷ *Richards v. Moore*, 5 Redf. 278, 282.

⁸ *Edwards' Estate*, 12 Phila. 85; *Schoul. Ex. § 40*, and English authorities.

⁹ *Kinney v. Keplinger*, 172 Ill. 449.

¹⁰ Wms. Ex. [242].

on the authority of Godolphin¹ and Swinburne,² that the appointment may be by implication; as, "I will that A. B. be my executor if C. D. will not," in which case the appointment is to C. D. if he accept. Or where the testator erroneously supposes that one whom he wishes to appoint is dead, and says in his will, "Forasmuch as [A. B. or C. D.] is dead, I make E. F. my executor," the person supposed * to be dead shall be executor if living. So [* 505] where a man willed that none should have any dealings with his goods until his son came to the age of eighteen years, except A. B., the latter was thereby appointed executor during the son's minority.³ But where executors were appointed, with a request that they were to serve until the testator's son became twenty-one years of age, this was held not to be an appointment of the son to the executorship when he should arrive at the designated age.⁴

§ 230. **Residence as a Qualification to the Office of Executor.**—At common law non-residence of the testator's appointee does not disqualify him as executor; even alien enemies have been allowed to maintain actions as executors.⁵ The same rule prevails in most American States; ⁶ but in Arkansas,⁷ Indiana,⁸ Kansas,⁹ Kentucky,¹⁰ Missouri,¹¹ Nebraska,¹² Oregon,¹³ and Pennsylvania,¹⁴ non-residents of the State are not permitted to act as executors; and if an executor removes from the State after being appointed, his authority as such will be revoked.¹⁵ In other States, also, non-residents are discriminated

¹ Pt. 2, c. 5, § 3.

² Pt. 4, § 4, pl. 6.

³ *Per* Rhodes, J., in *Brightman v. Keighley*, Cro. Eliz. 43, stating that it had been so ruled in 17 Eliz.

⁴ *Frisby v. Withers*, 61 Tex. 134, 138.

⁵ *Wms. Ex.* [229].

⁶ So in Alabama (*Keith v. Proctor*, 114 Ala. 676), Arizona, Connecticut, Colorado (in the court's sound discretion: *Corrigan v. Jones*, 14 Colo. 311), Delaware, Florida, Idaho, Illinois, Louisiana, Massachusetts, Minnesota, Mississippi, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Rhode Island (*Hammond v. Wood*, 15 R. I. 566), South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. As to disqualification of administrators by non-residence, see *post*, § 241, p. * 526, note.

⁷ Dig. of St. 1894, § 14. Becoming non-resident after appointment and before final settlement forfeits the letters granted; but the vacation of the letters requires the action of court on motion: *Haynes v.*

Lemmes, 39 Ark. 399; *McCreary v. Taylor*, 38 Ark. 393.

⁸ Ann. St. 1894, § 2394, construed in *Ewing v. Ewing*, 38 Ind. 390.

⁹ Gen. St. 1889, § 2812.

¹⁰ St. 1894, § 3846.

¹¹ Rev. St. 1889, § 10. Removal from the State does not of itself revoke the executor's letters testamentary; there must be action by the probate court: *State v. Rucker*, 59 Mo. 17, 24.

¹² Cons. St. 1893, § 1230.

¹³ Code, 1887, § 1090.

¹⁴ *Sargent, J.*, in *Sarkie's Appeal*, 2 Pa. St. 157.

¹⁵ Removal from the State by an executor or administrator is held ground for the revocation of letters, if the estate suffer thereby: *Succession of McDonough*, 7 La. An. 472, and the *onus* to prove this is on the party moving the revocation: *Scott v. Lawson*, 10 La. An. 547. See as to non-residence being a ground for the revocation of letters testamentary and of administration, *post*, § 270, p. * 576.

against in respect of the office of executor. So, in Georgia, a non-resident of the State may be appointed and act as such if he has an interest in the estate and will give bond;¹ but removal from the State does not abate letters testamentary.² In California a non-resident may be granted letters testamentary, but must come into the State within a reasonable time, personally submit himself to the jurisdiction of the court, and personally conduct the administration.³ In Iowa the non-resident executor of a non-resident testator may be appointed to administer.⁴ So in Minnesota, though the court may, for good reasons, which, however, do not render the executor legally incompetent, in its discretion decline to grant him letters;⁵ and in Maine,⁶ Michigan,⁷ and Ohio⁸ non-resident executors who fail to account and settle in the probate court when required are to [* 506] be *removed. In New York, "an alien residing out of the State" is declared incompetent to the office of executor; but this statute is held not to exclude a native of the State who may reside in another State.⁹ In Maryland, the executor must be a citizen of the United States;¹⁰ and in North Carolina, it is held that a non-resident may renounce the office in that State, though he accept it in the State of the testator's domicile.¹¹

States in which non-residents are discriminated against.

§ 231. **Infancy as a Disqualification.**—At common law and in many of the American States infancy does not operate as a disqualification to the eventual right of executorship; but the authority to qualify or act as such remains in abeyance until the infant reach the age of majority, or such age as may be fixed by law or statute as necessary to qualify. Previous to the statute of 38 Geo. III. c. 87, § 6, this age was fixed in England at the age of seventeen years,¹² and this is the law in several of the States;¹³ in others the age of eighteen years¹⁴ is fixed; in many it is twenty-one years,¹⁵

Infants eligible at common law at the age of seventeen;

so in some States;

¹ Code, 1895, § 3293.

² Walker v. Torrance, 12 Ga. 604. The same of administrators: Brown v. Strickland, 28 Ga. 387.

³ Brown's Estate, 80 Cal. 381.

⁴ And it is error to supplant a foreign executor of a foreign will probated in Iowa, with an Iowa administrator, unless for good reasons: *In re Miller*, 92 Iowa, 741.

⁵ Hardin v. Jamison, 60 Minn. 112. The court may compel a non-resident executor to submit himself to the jurisdiction of any of the State courts when it becomes necessary for the determination of a resident's claim: *State v. Probate Court*, 66 Minn. 246.

⁶ Rev. St. 1883, ch. 64, § 21.

⁷ How. St. 1882, § 5842.

⁸ Bates' Ann. St. 1897, § 6017.

⁹ McGregor v. McGregor, 33 How. Pr. 456.

¹⁰ Publ. G. L. 1888, art. 93, § 52.

¹¹ Hooper v. Moore, 5 Jones L. 130.

¹² Wms. Ex. [231], note (u), citing Godolph. pt. 2, c. 9, § 2; Swinb., pt. 5, § 1, pl. 6; Piggot's Case, 5 Co. 29 a.

¹³ In Colorado and Illinois.

¹⁴ In Iowa, Maryland, and Mississippi. See *Christopher v. Cox*, 25 Miss. 162.

¹⁵ In Alabama, Arkansas, Florida, Indiana, Kansas, Maine, Massachusetts, Missouri, New York, North Carolina, and South Carolina.

in others at eighteen, twenty-one, or at majority.

Administration until minor is of requisite age.

and in most of the others the age of legal majority. Where an infant is appointed sole executor, it is the duty of the probate court to appoint an administrator *durante minore ætate, cum testamento annexo*, who is to administer the estate until the infant has reached the requisite age;¹ but if other executors be also named who are of

full age, they may execute the will until the majority of the infant, who may then qualify and be admitted as executor.² As to the rules governing the appointment of an administrator *durante minore ætate*, see *post*,³ in connection with the appointment of administrators.

§ 232. **Coverture as a Disqualification to the Office of Executrix.**

— According to the canon law, a married woman may sue and be sued alone, without her husband, and it was held in the spiritual courts of England that, in the absence of a writ of prohibition,

* she may take upon herself the executorship of a will with- [* 507] out, or even against, the husband's consent or

Consent of husband is necessary at common law to enable a wife to be executrix.

will.⁴ At common law, however, the consent of the husband is necessary to enable the wife to assume the office of executrix;⁵ but he cannot compel her to assume the office against her will,⁶ although she will be bound, if the husband administers as in the wife's right, though against her consent, in so far that she cannot during his lifetime avoid or decline the executorship.⁷

In many of the American States married women are not competent

Coverture disqualifies in many States;

so in others unless the husband consent.

to act as executrices, and if a *feme sole* executrix marries, her authority is thereby extinguished;⁸ while in others she can do so only with the consent of her husband, as in Alabama,⁹ Colorado, Delaware, Louisiana, Maine,¹⁰ Massachusetts,¹¹ Mississippi, New Jersey, and Wisconsin. In California, Nevada, and Texas, the mar-

¹ See *ante*, § 182, as to administration *durante minore ætate*.

² Gary, Pr. L. § 240; 3 Redf. on Wills, 68; Wms. on Ex. [479].

³ § 248.

⁴ Wentw. Ex. 375-378.

⁵ Wentw. Ex. 376; Wms. Ex. [232]; 3 Redf. on Wills, 68.

⁶ Wms. Ex. [234], citing Godolph., pt. 2, c. 10, § 1; Da Rosa v. De Pinna, 2 Cas. Temp. Lee, 390.

⁷ Wms. Ex. [234], citing Godolphin and Wentworth, *supra*; Wankford v. Wankford, 1 Salk. 299, 306, in Lord Holt's judgment; Thrustout v. Croppin, 2 W. Bl. 801.

⁸ For instance, in Arkansas, Indiana, Kentucky, Michigan, Minnesota, Mis-

souri, Nebraska, New Hampshire, Rhode Island (whether coverture precludes the appointment of a married woman, *quære*: Hammond v. Wood, 15 R. I. 566), Vermont, Virginia, and West Virginia.

⁹ Although the statute requires the consent of the husband in writing, yet this is held directory only to the probate court, and letters testamentary granted to a married woman cannot be impeached collaterally, whether such consent appears affirmatively or not: English v. McNair, 34 Ala. 40, 49, citing earlier Alabama cases.

¹⁰ Stewart's Appeal, 56 Mo. 300.

¹¹ Wiggin v. Swett, 6 Met. (Mass.) 194, 196.

riage of a *feme sole* executrix revokes her authority, but a married woman appointed as such is competent to act. In construing the California statute the words "her authority is extinguished" by the re-marriage of an executrix, are held to mean "she ceases to be competent;" and that hence she is not thereby deprived *eo instanti* of all her powers, but may be proceeded against for removal.¹ In Iowa, Massachusetts,² and New York, a married woman may become executrix independently of her husband. The common-law doctrine, that the husband becomes executor in right of his wife upon marrying a *feme sole* executrix, is recognized in some States,³ but does not prevail generally.⁴

§ 233. **Mental Incapacity, Immorality, and other Disqualifications.**

— In most of the States there are statutory provisions [* 508] *disqualifying persons named as executors, on account of mental incapacity and immorality. Insane persons, persons convicted of infamous crime, and such as are incompetent on account of drunkenness, improvidence, or want of understanding or integrity, cannot be admitted as executors.⁵ In Louisiana, Maryland, Mississippi, and New York, no person can be appointed as executor who is in law incompetent to bind himself by contract, except, in some instances, married women; and in Ohio, no person who is legally incapable of assuming the duties of a trustee. It was held in New York, under a statute disqualifying on account of drunkenness, improvidence, or want of understanding, that executorship should be denied upon proof of mere ill-regulated temper and want of self-control existing in a high degree,⁶ and that a professional gambler is incompetent by reason of improvidence;⁷ but that an executor is illiterate, of narrow means, and has been guilty of misconduct and mismanagement, is not cause, under the statute, for superseding him, though it may be for requiring security.⁸ In Kentucky the immoral character of the nominee by the testator is held to be no bar to his appointment by

Marriage of a *feme sole* executrix revokes her authority.

Mental and moral disqualifications.

Insane persons, criminals.

Drunkards.

Persons incompetent to contract.

Ill-regulated temper.

Professional gambler.

¹ *Schroeder v. Superior Court*, 70 Cal. 343; *McMillan v. Hayward*, 94 Cal. 357. As to the causes justifying revocation of letters, see *post*, § 270.

² *Publ. St.* 1882, ch. 147, § 5.

³ *Lindsay v. Lindsay*, 1 Desaus. 150; *Wood v. Chetwood*, 27 N. J. Eq. 311. He becomes liable as co-administrator for any act of administration afterwards performed by her: *Dowty v. Hall*, 83 Ala. 165. In Georgia, letters granted to a woman abate on her marriage, but she may nominate her husband: *Long v. Huggins*, 72 Ga. 776, 788.

⁴ *Ellmaker's Estate*, 4 Watts, 34.

⁵ So provided in the statutes of Alabama, California, Colorado, Delaware, Illinois, Indiana, Maryland, Mississippi, Nevada, New York, North Carolina, Texas, and probably others.

⁶ *McGregor v. McGregor*, 33 How. Pr. 456.

⁷ *McMahon v. Harrison*, 6 N. Y. 443, affirming the Supreme Court, and overruling the surrogate, in *Harrison v. McMahon*, 1 Bradf. 283.

⁸ *Emerson v. Bowers*, 14 N. Y. 449.

the probate court,¹ and in Pennsylvania conviction as a habitual drunkard is no disqualification.² But in California the paramour of a dissolute testatrix, who had done no work for years, but "lived by his wits," was held an improper person to be appointed as executor.³ It is held in this State that the want of integrity, in order to disqualify, should be proved by clear and convincing evidence, and that by integrity is meant soundness of moral principle and character.⁴ Touching the principle upon which the testator's choice of an executor is respected, Mr. Schouler says (citing, however, only English cases, except that of *Sill v. McKnight* ⁵): "And so far has our law carried this principle as to permit persons obviously unsuitable for the trust to exercise it, to the detriment of creditors and legatees, on the suggestion that the testator, at all events, must have confided in such a person. Moreover, as courts have *observed with a touch of false [* 509] logic, the office of executor being held in another's right, it is not tainted by his personal guilt.⁶ Hence not only might persons attainted or outlawed for political offences become executors, but even those convicted of felony; crime seldom, if ever, operating to disqualify one for the trust."⁷

Idiots and lunatics.

Idiots and lunatics are deemed incapable of becoming executors, both at the common and the civil law.⁸

Poverty no disqualification.

Poverty, or even insolvency, constitutes no legal disqualification.⁹

It is said to be settled law in England that where a corporation aggregate is nominated as executor, it may appoint persons styled syndics to receive administration with the will annexed, who are sworn like other administrators,¹⁰ because they cannot prove the will, or at least cannot take the oath for the due execution of the office.¹¹ In the United States the prevalence of authority, once against the competency of corporations aggregate to act as executors,¹² seems now to turn the other way. In

Corporations aggregate.

¹ *Berry v. Hamilton*, 12 B. Mon. 191.

² *Sill v. McKnight*, 7 Watts & S. 244.

³ *Estate of Plaisance*, Myr. 117.

⁴ *In re Banquier*, 88 Cal. 302.

⁵ 7 Watts & S. 244.

⁶ *Smethurst v. Tomlin*, 2 Sw. & Tr. 143.

⁷ Schoul. Ex. § 33, citing Wms. Ex. [235]; Co. Litt. 128 a; 3 Bulst. 210; *Killigrew v. Killigrew*, 1 Vern. 184; *Smethurst v. Tomlin*, *supra*.

⁸ Schoul. Ex. § 33, giving as "a good reason at the outset" that such a person cannot determine whether to accept the trust or not.

⁹ Wms. Ex. [235], citing *Rex v. Raines*,

1 *Ld. Raym.* 361; *Hathornthwaite v. Russell*, 2 Atk. 126. See *post*, § 241, on the appointment of administrators.

¹⁰ *Goods of Darke*, 1 Sw. & Tr. 516; Wms. Ex. [229].

¹¹ Wms. Ex. [228], citing 1 Bla. Comm. 477, Com. Dig. Administrator, B. 2, Wentw. Ex., c. 1, p. 39, and adding: "The other grounds of the last author's doubt are stated to be: 1st, because they cannot be feoffees in trust, to others' use; 2d, they are a body framed for a special purpose."

¹² It is negated in Maryland: *President, &c. v. Browne*, 34 Md. 450; and formerly in New York: *Thompson's Es-*

Maryland it is held that the English doctrine, allowing them to designate one of their number to take administration with the will annexed, is not applicable.¹ In New Jersey this doctrine is recognized;² but whether a corporation aggregate can act as executor when nominated was left undecided.³ It appears from the recital of facts in the case of *Porter v. Trall*, that a corporation in [* 510] Philadelphia is chartered by the legislature * to act as executor, and such corporations may now be found in many States, permitted by statute to exercise the functions of executors and administrators in connection with trust funds.⁴ It has also been held that a firm may be nominated as executor, and that in such case letters testamentary will be granted to the individual members of the firm.⁵ And so of a corporation sole; the individual composing it may be admitted as executor.⁶

Partnership
firm as
executors.

§ 234. **Acceptance or Refusal of the Office of Executor.**—At common law, and in those of the States in which the authority of the executor is recognized as emanating from the will without a formal grant of letters testamentary, the question whether a person named in the will as executor has or has not accepted the office is sometimes difficult of solution. He cannot, of course, be compelled to accept the executorship, since it is a private office of trust named by the testator, and not by the law; he may refuse, even if in the lifetime of the testator he has agreed to accept the office.⁷ But the ordinary was empowered by statute⁸ to convene before him any person named as executor in a testament, “to the intent to prove or refuse the testament;” if he appear, either on citation or voluntarily, and pray time to consider, the ordinary in former times might grant letters *ad colligendum*, though this practice became obsolete; but if he appear and refuse to act, or if he fail to

Executor
nominated
may refuse
the office,

but may be
compelled to
accept or
refuse.

tate, 33 Barb. 334. In Delaware, where foreign administrators are permitted to maintain actions as such, the power of a corporation aggregate, as administrator, granted in another State, was recognized, the court inclining to the view that such power exists at common law: *Deringer v. Deringer*, 5 Houst. 416, 430. In Illinois, where the statute permits executors of foreign wills to convey realty in Illinois, without probate anew, it was held, where one of such foreign executors was a corporation, that the law of Illinois with reference to foreign corporations doing business in that State must first be complied with, before the power conferred could be exercised by such foreign execu-

tor: *Pennsylvania Co. v. Bauerle*, 143 Ill. 459.

¹ *President, &c. v. Browne*, *supra*.

² *Kirkpatrick's Will*, 22 N. J. Eq. 463.

³ *Porter v. Trall*, 30 N. J. Eq. 106.

⁴ *Schoul. Ex.* § 32. So in Pennsylvania, New Jersey (as appears from the case of *Camden Safe D. & T. Co.*, *supra*), New York, and Missouri.

⁵ *In re Fernie*, 6 Notes Cas. 657.

⁶ *Wms. Ex.* [229], and authorities.

⁷ *Wms. Ex.* [274], citing *Doyle v. Blake*, 2 Sch. & Lef. 231, 239; *Bac. Abr. Executors*, E. 9; *Douglass v. Forrest*, 4 Bing. 686, 704, *per Best*, C. J.; *Dunning v. Ocean National Bank*, 6 Lana. 296, 298.

⁸ 21 Hen. VIII. c. 5, § 8.

appear, administration *cum testamento annexo* will be granted to another. By a later statute,¹ it is provided that, if an executor appointed in a will die without having taken probate, and whenever an executor is cited and does not appear to the citation, the representation to the testator and the administration of his estate shall be

Right to refuse committed in like manner as if such person had not been
may be lost. appointed executor.² The right to refuse may be lost by the executor, if he do any act which amounts to administration; for if he once * administer, it is considered that he has [* 511] already accepted the executorship, and the court may compel him to prove the will; but if the court accept his refusal, notwithstanding he may have acted, the grant of administration to another will be valid. These two rules are laid down in England with respect to what acts will render an executor compellable to take probate:

Rules determining acceptance or refusal. *First*, whatever the executor does with relation to the goods and effects of the testator, which shows an intention in him to take upon himself the executorship, will regularly amount to an administration; *secondly*, whatever acts will make a man liable as executor *de son tort* will be deemed an election of the executorship.³

In the United States this subject is, on the one hand, of far smaller importance than at the common law, because in most of the States an executor has no authority to bind the estate of his testator without a formal grant of letters testamentary; and is, on the other hand, more readily determined, since it is mostly regulated by statutes.⁴ But since administration with the will annexed can only be granted in default of an executor named in the will, it is necessary that the court, before granting such administration, shall be informed that the executor, or all of several

No formality necessary to show acceptance or refusal. executors named,⁵ have renounced the trust, or are incompetent to serve. No formality is necessary in making such proof beyond compliance with the requirements of the statute; it is sufficient if the intention to renounce is clearly expressed in writing, and filed in the

¹ 21 & 22 Vict. c. 95, § 16.

² Wms. Ex. [275], citing Goods of Noddings, 2 Sw. & Tr. 15; Goods of Lorrimer, 2 Sw. & Tr. 471; Davis v. Davis, 31 L. J., P. M. & A. 216.

³ Wms. Ex. [278], and authorities.

⁴ Generally providing for acceptance within a certain time, or renunciation of record in the probate court. The Iowa statute providing for an acceptance within ten days does not apply to a foreign executor of a foreign will probated in Iowa; *Jare Miller*, 92 Iowa, 74. So in Alabama the statutory provision that a failure to

apply for letters within thirty days from the original probate of the will is a renunciation does not apply to foreign executors seeking ancillary letters as to whom the time must in general be computed from the time of the ancillary probate, but not in all cases: *Keith v. Proctor*, 114 Ala. 676, 684.

⁵ For if one or more of several executors qualify, he or they have all the powers which the will confers upon the whole number of executors: *Philips v. Stewart*, 59 Mo. 491; *Columbus Ins. Co. v. Humphries*, 64 Miss. 258, 276.

court¹ at any time before he undertakes the office or intermeddles with the estate,² even after propounding the will for probate,³ or being sworn as executor.⁴ So it has been held, that there may be a valid renunciation of the executorship by matter *in pais*, such, for instance, as an express parol consent to the grant of letters with the will annexed to another, not entered of record;⁵ and where executors are appointed [*512] to *sell lands, a neglect to qualify is *prima facie* evidence of a refusal to act, and will validate a sale made by the acting executors.⁶ A renunciation may be inferred from the conduct of the executor after being informed of his nomination, without formal communication from him.⁷ But it will appear later on, in connection with the subject of the appointment of administrators with the will annexed,⁸ that to support the validity of such appointment the record should show the renunciation;⁹ and an executor who has entered upon the discharge of his trust cannot afterward resign it, unless there be authority for such resignation,¹⁰ as is provided by statute in many of the States.¹¹ For the purpose of granting letters, either testamentary or of administration, the probate court may, at the instance of a person interested, or perhaps upon its own motion, summon the executor before it to prove the will;¹² and as the executor cannot avoid a will by refusing to accept the trust, he may thus be compelled either to accept or renounce it, so that administration with the will annexed may be granted.¹³ The time when it becomes imperative for the executor named to accept or renounce is when he is cited to do so; mere inaction and delay unaccompanied by act of intermeddling with the estate cannot amount to an acceptance against his consent.¹⁴ On the other hand, one who takes possession of a part of the goods of the testator, and disposes of them, is liable as executor,

Acts indicating acceptance or refusal.

Executor may be summoned to prove the will,

and accept or renounce executorship.

¹ Commonwealth v. Mateer, 16 Serg. & R. 416, 418.

² Sawyer v. Dozier, 5 Ired. L. 97.

³ Mitchell v. Adams, 1 Ired. L. 298.

⁴ Miller v. Meetch, 8 Pa. St. 417.

⁵ Thornton v. Winston, 4 Leigh, 152, 157, citing earlier Virginia cases; Thompsons v. Meek, 7 Leigh, 419, 428; Ayres v. Weed, 16 Conn. 291, 296, *et seq.*

⁶ Uldrick v. Simpson, 1 S. C. 283, 286; Robertson v. Gain, 2 Humph. 367, 381.

⁷ Solomon v. Wixon, 27 Conn. 520, 526; Marr v. Peay, 2 Murph. 84. And a statutory provision that a refusal to act as executor shall be communicated to the probate court must of necessity be directory only: Kilton v. Anderson, 18 R. I. 136.

⁸ Post, § 245.

⁹ Thompsons v. Meek, 7 Leigh, 419; Robertson v. McGeoch, 11 Pai. 640; De Peyster v. Clendinning, 8 Pai. 295; Judson v. Gibbons, 5 Wend. 224; Newton v. Cocke, 10 Ark. 169; Springs v. Irwin, 6 Ired. 27.

¹⁰ Haigood v. Wells, 1 Hill, Ch. 59, 61; Washington v. Blount, 8 Ired. Eq. 253, 256; Mussault's Executor, T. U. P. Charlt. 259.

¹¹ See post, § 273, and cases there cited.

¹² Ante, § 214.

¹³ Stebbins v. Lathrop, 4 Pick. 33, 41.

¹⁴ Ralston's Estate, 158 Pa. St. 645.

Death of one named as executor before grant of letters to him is equivalent to renunciation.

States recognizing the executor's executor as executor of original testator.

repudiated,

Executor nominated may renounce before grant of letters.

Renunciation may be retracted on death or re-

although he does not qualify.¹ It seems obvious that the death of one nominated as executor in a will before the grant of letters, and *a fortiori* before the probate of the will, amounts to a renunciation; and it is important to remember this only in those of the States in which the executor of an executor succeeds to the executor-

ship of the deceased executor's testator: for if the original executor die before completing the probate, he is considered in point of law as intestate with regard to the executorship, although he may have made a will and appointed executors, and although he die after taking the oath, if before the passing of the grant.² * The [* 513]

common-law rule, according to which the executor's executor succeeds to the executorship of the original testator³ is recognized in Florida,⁴ Georgia,⁵ North Carolina,⁶ South Carolina,⁷ and perhaps some other States;⁸ but in most of them this doctrine is repudiated, either by statute or the decision of courts.⁹

An executor nominated in the will, who has renounced, may retract his renunciation, and assume the office at any time before the grant of letters testamentary to other executors, or of letters of administration with the will annexed.¹⁰ So if an acting executor has been removed

for cause,¹¹ or died,¹² the renunciation of one named as co-executor may be retracted, and letters granted as if it had not been made;¹³ and, in the absence of statutory

¹ Van Horn v. Fonda, 5 Johns. Ch. 388; Worth v. McAden, 1 Dev. & B. Eq. 199.

² Drayton's Will, 4 McCord, 46, 52, quoting from Toller on Executors [49], and authorities cited by that author.

³ Post, § 350.

⁴ Hart v. Smith, 20 Fla. 58.

⁵ Burch v. Burch, 19 Ga. 174, 183. But see Windsor v. Bell, 61 Ga. 671, 675.

⁶ Roanoke Navigation Co. v. Green, 3 Dev. 434, holding that the principle does not apply if the original testator designated a successor in case of the death of his executor. And the executor may renounce the executorship of the original estate, and retain that of his own testator: Worth v. McAden, 1 Dev. & B. Eq. 199.

⁷ Drayton's Will, 4 McCord, 46; Lay v. Lay, 10 S. C. 208, 220; Reeves v. Tappan, 21 S. C. 1; the doctrine is now, however, regulated by statute: Laws, 1880, p. 363, no. 309.

⁸ See post, § 350, where the subject is more fully discussed.

⁹ Post, § 350. The States of Arkansas, Delaware, Kansas, Kentucky (but see Carroll v. Connett, 2 J. J. Marsh. 195), Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, Ohio, Oregon, Rhode Island, Texas, Vermont, Virginia, West Virginia, Wisconsin, and others, have abolished the doctrine of the transmission of the executorship to the executor's executor.

¹⁰ Robertson v. McGeoch, 11 Pa. 640; Taylor v. Tibbatts, 13 B. Mon. 177; Casey v. Gardiner, 4 Bradf. 13; Davis v. Inscoe, 84 N. C. 396, 402, citing Wood v. Sparks, 1 Dev. & Bat. 389. A renunciation prior to the death of the testator, for a consideration and against the testator's will, is of no legal effect: Staunton v. Parker, 19 Hun, 55, 60. But a renunciation cannot be retracted after letters have been issued to another: see post, § 243, p. * 531.

¹¹ Codding v. Newman, 3 Th. & C. 364.

¹² Dempsey's Will, Tuck. 51.

¹³ Perry v. DeWolf, 2 R. I. 103, 108; Judson v. Gibbons, 5 Wend. 224, 227.

regulation to the contrary, one of several executors named in a will, not taking letters testamentary when his co-executors do, may come in at any time afterward and do so.¹ But where there is objection to one of several executors named, the issue of letters testamentary must be suspended as to all until the [* 514] * determination of the objection.² A widow named as executrix has been allowed to renounce the executorship and qualify as administratrix with the will annexed;³ and the act of qualifying as administrator before proof of the will has been held not to constitute a renunciation of the right to qualify as executor on production of the will.⁴

removal of
grantee of
letters.

One of several
executors may
qualify after
co-executors.

But issue of
letters must be
suspended as
to all if one is
objected to.

One named as
executrix may
renounce and
take letters of
administration.

¹ *Savage, J.*, in *Judson v. Gibbons*, *supra*, citing *Toller*, 68, 69; *Wankford v. Wankford*, 1 Salk. 299; 5 Co. 28 a; 9 Co. 97. See also *Matter of Maxwell*, 3 N. J. Eq. 611, 614.

² *McGregor v. Buel*, 24 N. Y. 166.

³ *Briscoe v. Wickliffe*, 6 Dana, 157, 169.

⁴ *Thornton v. Winston*, 4 Leigh, 152

* CHAPTER XXVI.

[* 515]

LETTERS OF ADMINISTRATION.

§ 235. **Principles governing the Grant of General Letters of Administration.** — Administration is granted upon the estates of persons dying intestate, and *cum testamento annexo*, upon the estates of those who left a will, but no executor competent or willing to assume the office. Before letters of administration can properly be granted, there must be proof to the satisfaction of the probate court that the intestate died while domiciled within the territorial jurisdiction of such court, leaving property; or that he died elsewhere, leaving property within such jurisdiction. If he left a will, it must also be shown that there is no executor competent or willing to execute it.¹ The grant of letters of administration generally, after the death of the executor of a testate estate, instead of letters *cum testamento annexo*, has been held void.²

Letters of administration may be granted if no executor can be appointed.

Aside from the statutory regulations, which in every State determine what persons are entitled to the administration, and which of course must be observed in appointing an administrator to office, the discretion vested in probate courts in this respect is to be governed by well-known general principles. The most important of these is, that administration should be committed to those who are the ultimate or residuary beneficiaries of the estate, — those to whom the property will go after administration. To secure to them the right to administer is the paramount object of the statutes fixing the order of preference, and constitutes the aim and intention of courts in the exercise of such discretion as is vested in them. It is obvious that those who will reap the benefit of a wise, speedy, and economical administration, or, on the other hand, suffer the consequences of waste, improvidence, or mismanagement, have the highest interest and most influential motive to administer properly. Hence it is said that the right to administer follows the right to

Administration is committed to the ultimate beneficiaries of the estate.

* the personal property,³ — a rule the binding force of which [* 516]

¹ *Ante*, § 234; *post*, § 245.

² *Fields v. Carlton*, 75 Ga. 554, 560.

³ The inclination of English courts is so strong in this direction, that they per-

mitted the spirit of this rule to prevail over the letter of a statute preferring the next of kin to the residuary legatee: *Thomas v. Butler*, 1 Vent. 217, 219.

is recognized in America,¹ as well as in England.² The correlative of the rule is equally true,—that administration should not be granted to one whose interests are adverse to the estate.³

The prominence of the right of the surviving to administer the estate of a deceased spouse is strongly corroborative of the validity of this rule. In England the right belongs to the husband exclusively of all other persons, and the court of probate has no power or election to grant it to any other.⁴

Husband has sole right at common law.

“The foundation of this claim has been variously stated,”

says Williams. “By some it is said to be derived from the statute of 31 Edward III., on the ground of the husband’s being ‘the next and most lawful friend’ of his wife; ⁵ while there are other authorities which insist that the husband is entitled at common law *jure mariti*, and independently of the statutes.⁶ But the right, however founded, is now unquestionable, and is expressly conferred by statute.”⁷ This right is said not to be an ecclesiastical, but a civil right of the husband, though administered in the court of probate.⁸

In the United States the right of the surviving husband or wife to administer on the deceased spouse’s estate is generally, but not universally, accorded by statute; and whether the reason be found in the husband’s marital right to the wife’s personalty, extending in some States to her choses in action,⁹ or in any of the other causes suggested,¹⁰ it

Husband or widow has first right to administer.

¹ *Donahay v. Hall*, 45 N. J. Eq. 720; *In re Davis*, 106 Cal. 453, 457; *Thornton v. Winston*, 4 Leigh, 152; *Swezey v. Willis*, 1 Bradf. 495; *Leverett v. Dismukes*, 10 Ga. 98; *Long v. Huggins*, 72 Ga. 776; *Cutchin v. Wilkinson*, 1 Call, 1, 6; *Bieber’s Appeal*, 11 Pa. St. 157, 161; *Langan v. Bowman*, 12 Sm. & M. 715, 717; *Cottle v. Vanderheyden*, 11 Abb. Pr. n. s. 17, 20; *Jordan v. Ball*, 44 Miss. 194, 201; *Kirkpatrick’s Will*, 22 N. J. Eq. 463; *Dalrymple v. Gamble*, 66 Md. 298, 306, 307; *Johnson v. Johnson*, 15 R. I. 109.

² *Wms. Ex.* [418], citing *Goods of Gill*, 1 Hagg. 341, 342.

³ *Estate of Heron*, 6 Phila. 87, 89; *Owings v. Bates*, 9 Gill, 463, 466. See *post*, § 241, p. * 525; § 242, p. * 529.

⁴ *Wms. Ex.* [409], citing *Humphrey v. Bullen*, 1 Atk. 458; *Sir George Sands’s Case*, 3 Salk. 22; *Elliott v. Gurr*, 2 Phillim. 16.

⁵ 3 Salk. 22, *supra*; *Elliott v. Gurr*, *supra*.

⁶ *Com. Dig. Administrator*, B. 6; *Watt v. Watt*, 3 Ves. 244, 247.

⁷ 29 Car. II. c. 3, § 25.

⁸ *Wms. Ex.* [410], and authorities.

⁹ Before the recent sweeping changes in the law respecting the property of married women: *Whitaker v. Whitaker*, 2 John. 112, 117; *Hoskins v. Miller*, 2 Dev. 360, 362; *Donnington v. Mitchell*, 2 N. J. Eq. 243; *Byrne v. Stewart*, 3 Desaus. 135, 143; *Olmsted v. Keyes*, 85 N. Y. 593, 602.

¹⁰ Mr. Williams says, in note (e), p. [410], that others have supposed that the husband is entitled as next of kin to the wife, and cites *Fortre v. Fortre*, 1 Show. 351, and *Rex v. Bettesworth*, 2 Stra. 1111, 1112; “but,” he adds, “it seems clear that the husband is not of kin to his wife at all.” There are numerous American cases holding that husband and wife are not of kin to each other: *Green v. Hudson R. R.*, 32 Barb. 25, 28; *Lucas v. N. Y. Central R. R.*, 21 Barb. 245; *Wilson v. Frazier*, 2 Humph. 30; *Storer v. Wheatley*, 1 Pa. St. 506; *post*, § 423, and cases cited.

is *undeniable that they have, besides their personal interest in the estate, the control of the interests of the minor heirs, where there are such, being the natural guardians of their persons and estates, and thus unite in themselves, as the surviving centre and head of the family, a greater interest in the estate than any other single person — in all cases, at least, where the deceased leaves minor children. The exceptions to the right of husband or wife to administer still further corroborate the principle upon which

the rule is founded. It is held, in several States, that where by ante-nuptial agreement or by articles of separation the property of the husband or wife does not pass to the survivor, he or she is not entitled to the administration;¹ but if it gave the wife a power of disposal of her separate property which she has not executed, or where

Unless the property, by ante-nuptial agreement, descends to others.

a devise to a trustee for the wife's use ends with her death, the husband's right to administer is not affected.² So, too, in Louisiana, the beneficial heir, whether present or represented, is entitled to administration in preference to the surviving husband or wife;³ but the natural tutor has as such the right to administer the estate of the deceased spouse, unless creditors or adult heirs demand the appointment of an administrator;⁴ and this although the surviving spouse has the usufruct of the community property during life.⁵

§ 236. **The Husband's Right to Appointment.** — It appears from the preceding section that in England the husband's right to administer on the estate of his deceased wife is absolute, being expressly confirmed by statute.⁶ The statutes of many of the American * States embody the same or similar provisions; but in [* 518] others the principle that administration should follow the right to the personal property prevails over the husband's absolute

Statutes of some States deprive husband of right

right. Thus, the husband is not entitled to administer the wife's estate to the exclusion of her children, if they inherit;⁷ nor if he is excluded from any share in her

¹ *In re Davis*, 106 Cal. 453, 457; *Fowler v. Kell*, 14 Sm. & M. 68; *Ward v. Thompson*, 6 Gill & J. 349; *Bray v. Dudgeon*, 6 Munf. 132; *Maurer v. Naill*, 5 Md. 324; *Govane v. Govane*, 1 Har. & M. 346. But in Illinois the statute is held to be mandatory, and that the husband may administer though he has by post nuptial contract relinquished all his property rights in the estate: *O'Rear v. Crum*, 135 Ill. 294.

² *Hart v. Soward*, 12 B. Mon. 391; *Payne v. Payne*, 11 B. Mon. 138.

³ Code, art. 1121; *Succession of Williamson*, 3 La. An. 262.

⁴ *Labranche v. Trepagnier*, 4 La. An. 558.

⁵ *Succession of Brinkman*, 5 La. An. 27.

⁶ 29 Car. II. c. 3, § 25, which enacts that the Statute of Distributions (22 & 23 Car. II. c. 10) "shall not extend to the estates of *femes covert* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of said act": *Wms. Ex.* [410].

⁷ *Randall v. Shrader*, 17 Ala. 333, 335; *Goodrich v. Treat*, 3 Col. 408, 411.

estate;¹ but unless the statute expressly or by necessary implication deprive him of this right, it cannot be denied him;² and if any other person shall administer, he is considered in equity, with respect to the residue after paying the debts, as a trustee for the husband or his representatives.³

to administer
in certain
cases.

It has been held that the right of the husband to administer may be transferred by him to another, and that letters will be granted by the probate court to his nominee;⁴ and that upon his death, while administering upon the estate of his pre-deceased wife, his executor or administrator is entitled to administration *de bonis non* of the wife's estate, in preference to her next of kin.⁵ So the husband is entitled to administer although he be a non-resident,⁶ and to retain the wife's personal property without administration,⁷ whether a resident or not.⁸

Husband may
transfer his
right to ad-
minister.

Husband's
administrator
preferred to
wife's next of
kin.

That a marriage was voidable does not militate against the husband's right to administer the wife's personal estate, unless sentence of nullity was pronounced before her death;⁹ but a marriage absolutely void *ab initio* confers no rights upon the husband.¹⁰ So, also, notwithstanding a divorce [* 519] *a mensa et thoro*,¹¹ or his abandonment of * the wife, he is entitled to administer himself, or nominate to the register a fit person to be appointed.¹²

Husband is
authorized
though the
marriage have
been voidable,
but not if void.

§ 237. **The Widow's Right to Appointment.** — Under the English statute,¹³ the ordinary is directed to grant administration "to the widow *or* the next of kin, *or* to both," at his discretion; and although, by the seventy-third section of the Court of Probate Act,¹⁴ the power of the probate court in making grants of administration,

¹ See authorities, § 235, p. * 517.

² *Fairbanks v. Hill*, 3 Lea, 732; *Shumway v. Cooper*, 16 Barb. 556, 560; *Clark v. Clark*, 6 W. & S. 85.

³ *Hoppiss v. Eskridge*, 2 Ired. Eq. 54; *Weeks v. Jewett*, 45 N. H. 540; *Williams's Appeal*, 7 Pa. St. 259; *Allen v. Wilkins*, 3 Allen, 321; *Kenyon v. Saunders*, 18 R. I. 590.

⁴ *Patterson v. High*, 8 Ired. Eq. 52, 54. By statute in California: Code Civ. Pr. § 1365; Montana: Probate Act, 1887, § 55.

⁵ *Hendren v. Colgin*, 4 Munf. 231.

⁶ *Weaver v. Chace*, 5 R. I. 356. It should be noted, however, that the appointment of a non-resident was held to be within the discretion of the court. That he is entitled, although a non-resident, in those States in which non-residence is a disqualification, as indicated by *Redfield* (3 Redf. Wills, 81, note 8), is

not borne out by the authority cited. *Sarkie's Appeal*, 2 Pa. St. 157, 159; and the contrary is intimated in *O'Rear v. Crum*, 135 Ill. 294. The States in which non-residence is a disqualification are enumerated *post*, § 241, p. * 526, note.

⁷ *Robins v. McClure*, 100 N. Y. 328.

⁸ *Willis v. Jones*, 42 Md. 422; *Hubbard v. Barcus*, 38 Md. 175.

⁹ *Wms. Ex.* [410]; *Elliott v. Gurr*, 2 Phillim. 19; *White v. Lowe*, 1 Redf. 376; *Parker's Appeal*, 44 Pa. St. 309; *Smith v. Smith*, 1 Tex. 621.

¹⁰ *Browning v. Reane*, 2 Phillim. 69.

¹¹ *Clark v. Clark*, 6 W. & S. 85.

¹² *Coover's Appeal*, 52 Pa. St. 427, 430; to similar effect, *Nusz v. Grove*, 27 Md. 391; *Altemus's Case*, 1 Ashm. 49.

¹³ 21 Hen. VIII. c. 5, § 3.

¹⁴ 20 & 21 Vict. c. 77.

and deciding to whom they shall be granted, has been much enlarged, yet even under it the court is precluded from making a joint grant to a widow and one of the persons entitled to distribution (but not next of kin).¹ If a joint grant is to be made to the widow and *one* of the next of kin, *all* the other next of kin must consent thereto;² and the modern English practice is to favor the widow under ordinary circumstances.³

In the United States the widow is usually preferred to all others as administratrix of her deceased husband, but her claim is neither so generally recognized, nor based upon the same ground, as that of the husband to the estate of a deceased wife, but has its basis in the division of interests between her and the kindred.⁴ Where the widow and next of kin are placed in one class, as, for instance, in Massachusetts,⁵ Nebraska,⁶ and Pennsylvania,⁷ administration may be granted, in the discretion of the court or register, to the widow alone, or to the widow and one or more of the next of kin, or to one or more of the next of kin without the widow.

As the husband's right to administer on the deceased wife's estate depends upon a valid marriage, so the widow, to entitle her to administer her husband's estate, must be the surviving wife of an actual marriage.⁸ Hence one who cohabited with a man who had a wife living from whom he was not divorced, although unknown to her, and although

Widow of lawful marriage only entitled to administer. * she fully believed herself to be his lawful wife, [* 520] Divorced wife not entitled. is not entitled to administer;⁹ nor one divorced *a vinculo*.¹⁰ And though a marriage valid where contracted is in general valid everywhere, yet in many States if the parties simply leave the State of their domicile to evade a prohibited marriage by going elsewhere where it is not prohibited, intending at once to return, such

¹ Wms. Ex. [416], citing Goods of Browning, 2 Sw. & Tr. 634.

² Goods of Newbold, L. R. 1 P. & D. 285.

³ Stretch v. Pynn, 1 Cas. Temp. Lee, 30; Goddard v. Goddard, 3 Phillim. 637; Goods of Middleton, L. R. 14 Prob. D. 23.

⁴ *Ante*, § 235.

⁵ Cobb v. Newcomb, 19 Pick. 336; McGooch v. McGooch, 4 Mass. 348.

⁶ Comp. St. Neb. 1887, ch. 23, § 178.

⁷ McClellan's Appeal, 16 Pa. St. 110, 115; Gyger's Estate, 65 Pa. St. 311, 313.

⁸ Byrnes v. Dibble, 5 Redf. 383, 385.

⁹ O'Gara v. Eisenlohr, 38 N. Y. 296. But see Smith v. Smith, 1 Tex. 621, granting letters to a widow who had innocently married a man who had a wife

then living. The decision is based upon a provision of the Spanish law, according to which a person marrying in good faith shall enjoy the rights of a legitimate spouse; and "putative matrimony may be converted into a true marriage, if, after the celebration, the impediment ceases to exist. In the case, for example, that a man be married to a second wife, the first living, if afterward this one die, the second wife, who was ignorant of the first marriage of her husband, may, at her pleasure, select either to live with him, or be separated and marry another": *Ib.*, p. 629. See also, *ante*, § 107.

¹⁰ Dobson v. Butler, 17 Mo. 88; Ryan v. Ryan, 2 Phillim. 332.

marriage will be held void in the State of the domicil.¹

A divorce *a mensa et thoro* does not, as appears from the preceding section, deprive the husband of the right to administer, nor destroy the relation of marriage, but merely suspends some of the obligations arising out of that relation; and the right of succession is not impaired.² It seems, therefore, that in such case, and where the marriage was voidable, but not dissolved during the husband's lifetime,³ the widow's right to administer is not affected; and such right is restored by the annulling of a decree of divorce *a vinculo* after the husband's death.⁴ But where a widow had left her husband, renouncing all conjugal intercourse with him, a considerable time before his death, her right was held to have been abandoned;⁵ and a wife, divorced *a mensa et thoro* for adultery on her part, forfeits, it should seem, her right to the administration.⁶ And it has already been remarked, that where, by antenuptial agreement, or for any other reason, the widow is not entitled to any of the property of the husband, she also loses her right to administer it.⁷

Divorce *a mensa et thoro* does not disqualify.

Abandonment of husband,

and divorce *a mensa* for adultery held to disqualify.

Where discretion is vested in the court granting letters of administration, it is generally exercised in favor of the widow, unless some good reason be shown demanding a different course.⁸ If the one of those entitled be competent, and the other not, the appointment will of course be confined to the one [*521] competent; but if neither the widow nor next of kin be under legal disability, their personal suitability is to be considered; if the widow is evidently unsuitable, some other person (within the class from which the court may select) will be appointed.⁹ Coverture disqualifies a woman as administratrix in some of the States;¹⁰ where it does not, the remarriage of the widow is not *per se* an objection to her appointment;¹¹ but if administration be also demanded by a child, the second marriage might be a circumstance inducing the court to give preference to the child.¹²

Discretion is generally exercised in favor of widow.

Coverture disqualifies in some States.

¹ Stull's Estate, 183 Pa. St. 625, citing cases *pro* and *con*.

² *Per* Rogers, J., in Clark v. Clark, 6 W. & S. 85, 87; Nusz v. Grove, 27 Md. 391, 400, citing Slatter v. Slatter, 1 Younge & C. 28; Lambell v. Lambell, 3 Hagg. 568; Chappell v. Chappell, 7 Eccl. R. 451.

³ Parker's Appeal, 44 Pa. St. 309; Fyock's Estate, 135 Pa. St. 522; White v. Lowe, 1 Redf. 376.

⁴ Boyd's Appeal, 38 Pa. St. 246.

⁵ Odiorne's Appeal, 54 Pa. St. 175.

⁶ Pettifer v. James, Bunb. 16; Goods of Davies, 2 Curt. 628.

⁷ *Ante*, § 235, and authorities under p. *517.

⁸ Schoul. Ex. §§ 99, 100.

⁹ Smith, Pr. L. 70; Stearns v. Fiske, 18 Pick. 24, 27; Gary, Pr. L. § 267.

¹⁰ See *ante*, § 232, as to the effect of coverture upon executrices, and a list of the States in which coverture disqualifies. And see *post*, § 241, p. *525, as to the effect of coverture on administratrices.

¹¹ Schoul. Ex. § 100, citing Webb v. Needham, 1 Add. 494.

¹² Wms. Ex. [418], also relying on Webb v. Needham, *supra*.

§ 238. **Right of Next of Kin to the Appointment.** — It would be unprofitable to repeat a statement of the rules by which the proximity of kin is ascertained in order to designate their preference in the right to administer. They are given very fully in Williams on Executors,¹ as applicable under the English statutes which are copied or substantially followed in most American States; and in an earlier chapter of this treatise,² the principle is indicated according to which the property of the intestate descends, or is distributable, in

so far as the course of descent is not fixed by the statute *eo nomine*. Under the fundamental principle that the right of administration follows the right of property, the rules there pointed out are equally applicable here. The order in which next of kin are entitled to administer in England is recapitulated by Williams as follows, showing certain exceptions to the rule of computation respecting succession to inheritances: "In the first place the children and their lineal descendants to the remotest degree; and on the failure of children, the parents of the deceased are entitled to the administration; then follow brothers and sisters; then grandfathers and grandmothers; then uncles or nephews, great-grandfathers and great-grandmothers, and lastly cousins.³ In States where the husband is entitled to his wife's property, if the next of kin be a married woman and she renounces, the grant is made to the husband; for he has an interest, and the grant must fol-

low the *interest, and the wife cannot by renouncing deprive [* 522] her husband of his right to the grant.⁴ The preference given by statute to the next of kin is obligatory upon the court, and it is error to appoint a stranger where a son, who is eligible and qualified, asks to be appointed.⁵ So an adopted child having a right of inheritance must be appointed; but otherwise, if it has no interest in the estate.⁶

It may happen that disqualification existing at the time of the decedent's death is removed before the grant of letters. In such case, letters should be granted to the person entitled to the same at the time of the application thereof, although such person was, at the time of the intestate's death, disqualified.⁷

§ 239. **Right of Creditors to Appointment.**—It follows from the principle, repeatedly stated above, of committing administration

¹ Page [419] *et seq.*

² *Ante*, § 72.

³ Wms. Ex. [425], citing 2 Bla. Comm. 505.

⁴ Haynes v. Matthews, 1 Sw. & Tr. 460.

⁵ Hayes v. Hayes, 75 Ind. 395, 398.

⁶ Estate of McCully, 13 Phila. 296, holding that the statutes of Pennsylvania

relating to the adoption of children, while conferring the right to inherit, do not create relationship, and citing on this point Commonwealth v. Nancrede, 32 Pa. St. 389, and Shaper v. Eneu, 54 Pa. St. 304.

⁷ Griffith v. Coleman, 61 Md. 250.

to those who have the ultimate interest in the estate, that creditors or their nominees are preferred when the assets of an estate are not more than sufficient to pay the debts, and funeral and administration expenses. They are accordingly preferred to the next of kin in some States,¹ in others their right is subordinate to that of the next of kin, but superior to that of other persons,² and the right of a creditor is generally recognized where neither husband nor wife, nor any of the next of kin, will qualify;³ and it has been held error to refuse to appoint a creditor on the ground that the debt is barred by limitation;⁴ but if those who are preferred by statute are willing to qualify, it is error to appoint a creditor.⁵ It has been held [* 523] in * North Carolina, that the assignment of a debt after the death of the debtor does not constitute the assignee a creditor authorizing him to take administration,⁶ and in Massachusetts that a cause of action which does not survive the debtor does not support a claim to administer on the debtor's estate;⁷ but in Maryland a niece by marriage, having paid the funeral expenses and taken an assignment of the claim from the undertaker, was held entitled to administration as the sole creditor.⁸ In Texas⁹ and Virginia¹⁰ creditors have no preference. In Louisiana the creditor first applying has preference over one applying subsequently, without regard to the dignity or magnitude of their respective claims;¹¹ but in Georgia the statute preferring him who had the greatest interest was construed as giving to a creditor of superior dignity, whose claim would sweep the estate, preference over those who would get nothing, although having claims greater in amount.¹² In Oregon, while in an *ex parte* application for letters a general allegation that the petitioner is the principal creditor would perhaps be sufficient to give the court

In some States, creditors entitled in insolvent estates;

aliter in other States.

¹ *Cutlar v. Quince*, 2 Hayw. 60; *Long v. Easley*, 13 Ala. 239, 243 (in Alabama, when an estate is reported insolvent, the administrator is removed and the creditors appoint a person to wind up the estate); *Sturges v. Tufts*, R. M. Charl. 17.

² *Hoffman v. Gold*, 8 Gill & J. 79, 84. In California, the court, in its discretion, may appoint the nominee of the next of kin in preference to a creditor: *Estate of Wyche*, Myr. 85. So in Nebraska: *Comp. St.* 1887, ch. 23, § 178. So, it seems, in Georgia, although the estate is insolvent, and the sole legatee be a minor represented by a guardian: *Myers v. Cann*, 95 Ga. 383, 386.

³ *Mitchel v. Lunt*, *per* Parsons, C. J., 4 Mass. 654, 659; *Royce v. Burrell*, 12 Mass. 407, 411; *Arnold v. Sabin*, 1 Cush. 325; *Lentz v. Pilert*, 60 Md. 296.

⁴ *Ex parte Caig*, T. U. P. Charl. 159. But see *Succession of Sarrazin*, 34 La. An. 1168; *Beauregard v. Lampton*, 33 La. An. 827.

⁵ *Haxall v. Lee*, 2 Leigh, 267; *Carthey v. Webb*, 2 Murph. 268.

⁶ *Pearce v. Castrix*, 8 Jones L. 71. The reason assigned is, that to allow such creditor to administer would be to tempt him to abuse the administrator's right of retainer.

⁷ *Stebbins v. Palmer*, 1 Pick. 71, 78; *Smith v. Sherman*, 4 Cush. 408, 412.

⁸ *Lentz v. Pilert*, 60 Md. 296, citing English authorities.

⁹ *Cain v. Haas*, 18 Tex. 616.

¹⁰ *McCandlish v. Hopkins*, 6 Call, 208.

¹¹ *Succession of Beraut*, 21 La. An. 666.

¹² *Freeman v. Worrill*, 42 Ga. 401.

jurisdiction (the next of kin having refused), yet where a creditor already appointed is sought to be removed because the new applicant is the principal creditor, a bare allegation is insufficient; he must aver the facts making him such.¹ The administrator of one to whom the deceased was indebted is a creditor, and may be appointed to administer the estate of the deceased debtor, although another creditor is recommended by the widow, and by creditors representing more than half the indebtedness of the deceased.² But in Maryland it was held, that one claiming as trustee, and not as an individual, to be the largest creditor, is not entitled to the letters;³ and so it is held that the president of a corporation to whom deceased was indebted, cannot be regarded as a creditor, so as to entitle him to letters in his individual name.⁴ Where the decedent was largely indebted to a county for unpaid taxes, which could not be collected without administration, it was held proper that the treasurer of the county should take out letters of administration, none of the next of kin applying.⁵

§ 240. **Right of the Public Administrator to the Administration.**—It appears from the consideration of the functions of public administrators in a previous chapter,⁶ that they are public officers in a sense different from that in which executors or administrators are also considered public officers, in this, that they are elected or appointed directly by the people, or the political appointing power, and assume the administration of estates *ex officio*, or, when they receive their authority over a particular estate from the probate court, the grant to them is *virtute officii*.⁷ It has also been remarked that

Public administrators administer *ex officio*.
in two of the * States⁸ the public administrator takes charge [* 524] of estates, under circumstances pointed out by the statute, without judicial order, thus conferring upon him *quasi* judicial authority, subject, however, to the control of the probate court; while in other States his authority in each particular estate is derived from appointment by the probate court.

The circumstances under which the public administrator is entitled to appointment, or is preferred in the discretion of the court, have been fully discussed in connection with the statement of the functions of his office.

¹ Cusick v. Hammer, 25 Oreg. 472.

² *Ex parte* Ostendorff, 17 S. C. 22.

³ Gleen v. Reed, 74 Md. 238.

⁴ Myers v. Cann, 95 Ga. 383.

⁵ Bowen v. Stewart, 128 Ind. 507, 511, 516.

⁶ *Ante*, § 180.

⁷ In Alabama it was held that the general administrator's might be a *quasi* office, with none of the attributes of a

municipal office; but if viewed as an office, it belongs to the class of minor offices essential to the proper conduct of the government and convenience of the people which was not disturbed by the reconstruction of the State after the suppression of the rebellion: McGuire v. Buckley, 58 Ala. 120, 131.

⁸ Missouri and New York.

§ 241. **Disqualifications excluding from the Right to Appointment.**—

The persons entitled to the grant of administration according to the rules above set forth may be disqualified by statutory provision, such as infancy, coverture of a female, non-residence, etc., in which case letters of administration must be granted to some other person. It is safe to assume that what will disqualify one from acting as executor will equally defeat the right to administer;¹ but not all persons competent as executors are likewise competent as administrator. Thus, insolvency has been held to disqualify one for the office of administrator, on the ground that the beneficiaries of the estate are entitled to the security of an administrator's personal liability, as well as that of his bail;² illiteracy, because one who can neither read nor write would be forced to trust to agents, and would be at the mercy of designing persons, thereby exposing the interests of the estate to danger of loss from mismanagement and corruption;³ and so subjection to undue influence of one charged with fraudulent designs against the estate.⁴ Neither poverty nor illiteracy, however, is ordinarily deemed to deprive one, otherwise preferred,

Disqualification to the office of executor also disqualifies as administrator.

Insolvency.

Illiteracy.

Subjection to undue influence.

of the right to administer an estate.⁵ Another dis-
[* 525] qualification in * administrators, though not in executors, or in a less degree, is that of adverse or inconsistent interest. Where, for instance, one person represents two estates between which litigation ensues: in such case, he would necessarily be both plaintiff and defendant, to the manifest detriment of justice, and the jeopardy of the interests of one or both the estates.⁶ And so it would be highly improper to appoint one, whether next of kin or not, who claims in his own right assets of the estate, or which were in possession of the intestate at the time of his death, or whose interests are in antago-

Adverse interest.

Claimants against the estate.

¹ As to disqualifications of executors, see *ante*, §§ 230-233.

² *Cornprobst's Appeal*, 33 Pa. St. 537. "Insolvency is the state of a person who, from any cause, is unable to pay his debts in the usual course of trade;" a poor person is not necessarily insolvent: *Levan's Appeal*, 112 Pa. St. 294, 300.

³ *Stephenson v. Stephenson*, 4 Jones L. 472.

⁴ *Stearns v. Fiske*, 18 Pick. 24.

⁵ *Nusz v. Grove*, 27 Md. 391; *Gregg v. Wilson*, 24 Ind. 227; *Estate of Pacheco*, 23 Cal. 476; *Ballard v. Charlesworth*, 1 Dem. 501; *Bowersox's Appeal*, 100 Pa. St. 434, 437, followed in *Wilkey's Appeal*, 108 Pa. St. 567.

⁶ In some of the States the statute inhibits such inconsistent appointments; in others, courts decide them to be improper and reprehensible: *State v. Bidingmaier*, 26 Mo. 483; *State v. Reinhardt*, 31 Mo. 95. A surviving partner should not be appointed administrator of the deceased partner's estate: *Heward v. Slagle*, 52 Ill. 336; *Cornell v. Gallaher*, 16 Cal. 367. The statutory exclusion of a surviving partner extends, in California, to one who had formerly been a partner of the deceased, if any partnership accounts remain unsettled: *Garber's Estate*, 74 Cal. 338.

nism to the estate.¹ Such considerations are not permitted to interfere with the right of the executor.² But in Indiana it is held that the law does not forbid the appointment of the same person to administer two or more estates, although there be conflicting interests.³

What has heretofore been said concerning the statutory disqualifications of executors,⁴ applies with equal force to administrators. In

Infancy. most of the States an infant can neither act as, nor

nominate, an administrator;⁵ married women are in

Cverture. many of the States disqualified,⁶ and likewise

Non-residence. * non-residents.⁷ Under statutes excluding per- [* 526]

¹ Bieher's Appeal, 11 Pa. St. 157, 162; Heron's Estate, 6 Phila. 87; Pickering v. Pendexter, 46 N. H. 69; Owings v. Bates, 9 Gill, 463; Moody v. Moody, 29 Ga. 519; Bridgman v. Bridgman, 30 W. Va. 212, 221; Mills' Estate, 22 Oreg. 210. But because the son of the applicant for letters has a large claim against the estate is no reason to disqualify the father; Root v. Davis, 10 Mont. 228, 263; see dissenting opinion, p. 276 *et seq.*

² The English doctrine of executorship by reason of being the executor's executor assigns the unadministered effects of the first testator to the same custody as his executor's effects, and the liability to account and the duty to enforce the accounting are united in the same person. So, in some of the States, the right of the husband's executor to letters *de bonis non* on the pre-deceased wife's estate, on which the husband had been administering, is still recognized as superior to the right of the wife's next of kin: Hendren v. Colgin, 4 Munf. 231; Matter of Harvey, 3 Redf. 214, 217, citing authorities; while the husband's administrator has no such right: Matter of O'Niel, 2 Redf. 544. See also Perry v. DeWolf, 2 R. I. 103, and *In re Banquier*, 88 Cal. 302, as to an executor's uniting different inconsistent interests in his person.

³ Wright v. Wright, 72 Ind. 149.

⁴ *Ante*, § 233.

⁵ And this is so whether there is, or is not, any other next of kin capable to administer: Rea v. Englesing, 56 Miss. 463; and the marriage of a female infant does not qualify her to receive the appointment: Briscoe v. Tarkington, 5 La. An. 692. And a New York case holds that letters granted to a minor are abso-

lutely void, as not being within the court's jurisdiction: Knox v. Nobel, 77 Hun, 230, relying on Carow v. Mowatt, 2 Edw. Ch. 57; while in Alabama letters to a minor are only voidable, and if ratified by the administrator on majority cannot be revoked: Davis v. Miller, 106 Ala. 154.

⁶ It is held that married women may be appointed administratrices in Maryland: Binnerman v. Weaver, 8 Md. 517; Pennsylvania: Gyger's Estate, 65 Pa. St. 311; South Carolina: *Ex parte Nuru-berger*, 40 S. C. 334; Texas: but not without the husband's consent: Nickelson v. Ingram, 24 Tex. 630. In Massachusetts marriage extinguishes the authority of a joint, but not of a sole administratrix: Barber v. Bush, 7 Mass. 510. In some States, the husband marrying an administratrix is invested with her powers during their joint lives: Pistole v. Street, 5 Port. 64; Memphis & C. R. R. v. Womack, 84 Ala. 149, 153. So formerly in Arkansas: Ferguson v. Collins, 8 Ark. 241.

⁷ It was held that non-residence does not disqualify in Maryland: Ehlen v. Ehlen, 64 Md. 360; South Carolina: Jones v. Jones, 12 Rich. 623; New York: Matter of Williams, 44 Hun, 67; Robinson v. Oceanic Co., 112 N. Y. 315 (holding that the non-resident does not in any sense become resident so as to be able to maintain a suit not otherwise maintainable); and Virginia: *Ex parte Barker*, 2 Leigh, 719. In Iowa, while non-residence does not disqualify, a non-resident ought not to be appointed unless it be made to appear that the interests of the estate, and of heirs and creditors, will be as well protected as by the appointment of a resident: Chicago, B. & Q. Railroad v. Gould, 64 Iowa, 343. In West Virginia the courts

sons convicted of infamous crime from the right to be appointed, no degree of legal or moral guilt is sufficient to disqualify, short of conviction after indictment or other criminal proceeding¹ within the State.² Intermeddling with the goods of an estate, so as to render one liable as an executor *de son tort*, does not *per se* destroy the right to administration. "There being no other disability," says Charlton, J., "it must be granted to him, the court of ordinary taking care to require security commensurate with the mischief they have reason to anticipate from his former conduct."³ "Want of understanding" must amount to a lack of intelligence, and cannot be presumed from a lack of information or misinformation of the law;⁴ and "improvidence," as a ground of exclusion, is such a want of care and forethought as would be likely to render the estate and effects liable to be lost or diminished in value;⁵ it refers to such habits of the mind and body as render a man generally and under all ordinary circumstances unfit to serve.⁶ An applicant for letters of administration will not be denied them by reason of his intemperance, unless it be of such gross character as would warrant overseers of the poor to designate him as an habitual drunkard, or a jury to adjudge him so.⁷ Where one otherwise entitled to letters was *non compos mentis* and under guardianship, letters were granted to his guardian in preference to others.⁸

Criminals.

Lack of understanding.

Improvidence.

Intemperance.

It need hardly be mentioned, that the appointment of himself by a judge of probate would be void, since the essential element of justice to the parties interested would thereby be jeopardized;⁹ and it has been held that a judge of probate

Interest of the judge.

will not appoint a non-resident distributee administrator if any other distributee competent to act and willing to assume the trust is within the jurisdiction of the court: *Bridgman v. Bridgman*, 30 W. Va. 212, 221; and in Wisconsin the choice of a non-resident by one preferred to administer should be disregarded: *Sargent's Estate*, 62 Wisc. 130. In California non-residence is a disqualification: *Estate of Beech*, 63 Cal. 458; and so in Pennsylvania: *Frick's Appeal*, 114 Pa. St. 29; Illinois: *Child v. Gratiot*, 41 Ill. 357; Montana: *Probate Act*, 1887, § 55.

¹ *Coope v. Lowerre*, 1 Barb. Ch. 45.

² A conviction in another State will not disqualify: *O'Brien's Estate*, 3 Dem. 156; s. c. 67 How. Pr. 503.

³ *Carnochan v. Abrahams*, T. U. P. Charlton, 196, 211; *Bingham v. Crenshaw*, 34 Ala. 683, 686, relying for author-

ity on *Chittenden v. Knight*, 2 Lee, 559. The cases holding that the appointment of the executor *de son tort* as administrator validates his previous acts are incompatible with the theory that such previous tortious acts disqualify: see the cases mentioned *ante*, § 196.

⁴ *Shilton's Estate*, Tuck. 73.

⁵ *Coope v. Lowerre*, *supra*; *O'Brien's Estate*, *supra*; *Matter of Cutting*, 5 Dem. 456; *In re Connors*, 110 Cal. 408; *Root v. Davis*, 10 Mont. 228, 236, construing also a statute disqualifying for "want of integrity."

⁶ *Emerson v. Bowers*, 14 N. Y. 449.

⁷ *Elmer v. Kechele*, 1 Redf. 472. See in connection herewith *post*, § 269, p. *573, note.

⁸ *Mowry v. Latham*, 17 R. I. 480.

⁹ *Schoul. Ex.* § 114.

interested in an estate cannot grant administration thereon.¹

The * appointment of a son of the judge was held to be a [* 527]

Nepotism. manifest violation of judicial delicacy and propriety, but not void, in Alabama;² but in Massachusetts

the appointment of the brother of the judge's wife was held void.³

§ 242. **Considerations governing the Discretion.**— Between applicants of the same class, all of whom are equally entitled, it is discretionary with the probate court who shall be selected, and no appeal lies from the exercise of such discretion except in case of gross abuse.⁴ But it is obvious that, in the exercise of the power of ap-

Designation by the statute is compulsory on the court. pointing administrators, the court is limited to the selection of such persons as are competent under the statute, in the order therein pointed out. Thus, if the widow constitute a class by herself, as she does in many States, she must be appointed if willing to serve, and not disqualified under the statutory regulations of the subject,⁵ no matter what objections exist to her administration, or how plausible they be. There is, in such case, no discretion.⁶

So where the statute makes a distinction of sex between those oth-

¹ *Sigourney v. Sibley*, 22 Pick. 507, citing earlier Massachusetts cases: *Thorn-ton v. Moore*, 61 Ala. 347, 354. Under the Maine statute, a probate judge is not interested in an estate, so as to disqualify him from acting, because his aunt by marriage is a legatee: *Marston, Petitioner*, 79 Me. 25; but where a probate judge is appointed executor he cannot, even before probate, appoint a special administrator on another estate to which his testator was largely indebted: *Hussey v. Southard*, 90 Me. 296. In California, under a statute which disqualifies a judge who is related to either party within the third degree, it was held that by "party" was meant not only those who were parties to the record, but also those whose interests were represented by parties to the record: *Howell v. Budd*, 91 Cal. 342 (holding a judge disqualified where one of the parties was represented by the judge's sons, who had an interest in the estate contingent on the success of their client).

² *Plowman v. Henderson*, 59 Ala. 559, 564; *Koger v. Franklin*, 79 Ala. 505. So of a son-in-law: *Hine v. Hussy*, 45 Ala. 496, 512; *Hayes v. Collier*, 47 Ala. 726, 728.

³ *Hall v. Thayer*, 105 Mass. 219, and cases cited on cognate principles.

⁴ *Bowie v. Bowie*, 73 Md. 232; *Wallis*

v. Cooper, 123 Ind. 40; *Succession of Boudreaux*, 42 La. An. 296; *State v. Fowler*, 108 Mo. 465.

⁵ *Radford v. Radford*, 5 Dana, 156, holding that residence in another State disqualifies the widow. So in Iowa, an administrator already appointed will not be removed in order that a non-resident widow may be appointed: *O'Brien's Estate*, 63 Iowa, 622.

⁶ *Pendleton v. Pendleton*, 6 Sm. & M. 448; *Muirhead v. Muirhead*, 6 Sm. & M. 451, holding that, where a son had been appointed within sixty days after the intestate's death, his letters were properly revoked on the application of the widow; *Matter of Williams*, 5 Dem. 292, affirmed 44 Hun, 67; *State v. Fowler*, 108 Mo. 465. "The right to the appointment is given by law, and the court has under these circumstances no discretion concerning it": *In re Nickals*, 21 Nev. 462; to same effect: *McDonald's Estate*, 118 Cal. 277. In Missouri one having a prior right to administer and whom the court illegally passes by without notice, has a right to a *mandamus* in the first instance, or to appeal from the appointment: *State v. Collier*, 62 Mo. App. 38, holding that the question whether the applicant is the widow can be raised by appeal only.

erwise equally entitled, the individuals composing the favored class must be appointed, if they apply, no matter how desirable the appointment of one of the other sex might be to the majority of those interested,¹ unless the favored class are under some statutory disability.² And where an unmarried is preferred to a married female, the court cannot reject the application of the former, although it is objected against her that she is a professed nun, and the inmate of a convent.³ Where the widow and next of kin are placed in the same class as to the right of appointment, the widow, as has already been stated,⁴ is preferred, other things being equal; a sole being likewise preferred to a joint administration.⁵ And if there be

Widow in same class with next of kin is preferred.

Sole is preferable to joint administration.

no next of kin competent to be appointed, the [* 528] * widow has the sole right.⁶ It is also held, that, where the widow has the sole right to be appointed, the court may, at her desire, associate a stranger in blood with her, although the next of kin object thereto;⁷ and may associate the widow with an administrator already appointed, against his protest.⁸

Stranger may be associated with widow.

The rule which is the foundation of the preference accorded by the statutes — i. e. to commit the administration to those who are eventually entitled to the property — is equally binding upon the court, in the exercise of the discretion vested in it in choosing between several individuals placed by the statute in the same class of preference. It follows, from this, that the court will rarely or never be called on to decide on questions of the policy of following the lineal or collateral direction of kinship, as would be important at the civil law, or computing the propinquity between the lineal and collateral kindred, as would be necessary at the common law;⁹ but, having ascertained to whom the property of the intestate devolves under the statute governing this subject,¹⁰ its discretion is narrowed to the individual or class of individuals so entitled.¹¹ If this class include the widow, together with children or other next of kin, the widow is, as we have seen before, generally preferred; but the preference must yield where she is unsuitable, in which case one or more of the next of kin will be

Rule giving administration to those ultimately interested in the estate should guide discretion.

¹ Cook v. Carr, 19 Md. 1.

² Wickwire v. Chapman, 15 Barb. 302.

³ Smith v. Young, 5 Gill, 197, 203.

⁴ Ante, § 235.

⁵ Wms. Ex. [417]; Schoul. Ex. § 99; 3 Redf. on Wills, 83, pl. 7.

⁶ McGooch v. McGooch, 4 Mass. 348.

⁷ Shropshire v. Withers, 5 J. J. Marsh. 210. See also Quintard v. Morgan, 4 Dem. 168, 174, associating a stranger with one preferred, where the interest of the estate required it.

⁸ Read v. Howe, 13 Iowa, 50.

⁹ Schoul. Ex. § 103.

¹⁰ As to which see ante, ch. viii.

¹¹ In some States the rule is enacted by statute, that "the same rule shall obtain in regard to the granting letters of administration on intestate estates, as regulates the distribution thereof": Leverett v. Dismukes, 10 Ga. 98, 99; Sweezy v. Willis, 1 Bradf. 495.

entitled.¹ In selecting from among the next of kin, the preference may be determined by the ratio in which the parties are entitled to distribution; for if one be entitled to more than another, he will have a greater interest in the proper administration of the estate.² And in cases of conflicting claims, the applicant upon whom a majority of the parties in interest agree will generally be * pre- [* 529]ferred,³ but not, of course, unless the nominee belong to the same class; for the order of preference enacted by statute cannot

Older preferred to younger man; male over female; unmarried over married woman; experienced over inexperienced; one who has not been a bankrupt over one who has.

Hostility to parties in interest.

Antagonism of interest.

fication,¹² is an important circumstance to consider in passing upon

be changed or ignored to the postponement of any person included therein.⁴ Other things being precisely even, the scale may be inclined by the preference of an older over a younger person;⁵ or of a male over a female;⁶ of an unmarried over a married woman;⁷ and of one accustomed to business over one inexperienced.⁸ *Ceteris paribus*, the fact that an applicant had twice been a bankrupt militates against him, to the preference of one who had not been bankrupt;⁹ and so does the fact that one, in addition to being of the next of kin, is also a creditor.¹⁰ Nor will one be appointed who is in such hostility to the others as will disqualify him from fairly considering their claims.¹¹ The antagonism in interest, which in some States amounts to a statutory disqualification,¹² is an important circumstance to consider in passing upon

¹ See *ante*, as to the widow's disqualification, §§ 237, 241. Disqualification to take the administration under a statute giving her preference would seem, *a fortiori*, to disqualify her under a statute placing her in a class with others.

² *Horskins v. Morel*, T. U. P. Charlt. 69; *Moody v. Moody*, 29 Ga. 519, 522; *Quintard v. Morgan*, 4 Dem. 168.

³ *Mandeville v. Mandeville*, 35 Ga. 243, 247 (holding that in such case the ordinary has no discretion, but must appoint the nominee); *McBeth v. Hunt*, 2 Strob. L. 335, 341. Mr. Williams says that this principle was recognized as early as 1678, in the case of *Cartwright*, 1 Freem. 258; see *Sawbridge v. Hill*, L. R. 2 P. & D. 219; also *Murdock v. Hunt*, 68 Ga. 164, 166. See *post*, § 244, for a fuller discussion of the effect given to renunciation or request of those entitled to administer in favor of their nominees.

⁴ *McClellan's Appeal*, 16 Pa. St. 110, 115. See authorities cited *post*, § 244.

⁵ *Wms. Ex.* [427], citing *Warwick v. Greville*, 1 Phillim. 122, 125; *Coppin v.*

Dillon, 4 Hagg. 361, 376; *Hill's Case*, 55 N. J. Eq. 764.

⁶ *In re Drowne*, 1 Connolly, 163, 169; *Hill's Case*, *supra*; rule that the grant will follow the interest preponderates over the preference of a male over a female; *Iredale v. Ford*, 1 Sw. & Tr. 305; *Chittenden v. Knight*, 2 Lee, 559. Resident adult females are preferred to non-resident minor males of the same degree: *Wickwire v. Chapman*, 15 Barb. 302.

⁷ *Administration of Curser*, 89 N. Y. 401, 404.

⁸ *Williams v. Wilkins*, 2 Phillim. 100; see *Atkinson v. Hasty*, 21 Neb. 663, 667.

⁹ *Bell v. Timiswood*, 2 Phillim. 22.

¹⁰ *Wms. Ex.* [427], citing *Webb v. Needham*, 1 Add. 494; *Owings v. Bates*, 9 Gill, 463, 466.

¹¹ Under a statute forbidding the appointment of an "incapable" person. It was held that neither of the contending parties should be intrusted with the power of administration, because their animosity would probably lead to an abuse of the trust; *Drew's Appeal*, 58 N. H. 319.

¹² See *ante*, § 241.

the relative claims of applicants in equal degree under the statute, although, if such person be the only applicant, the court may have no power to reject him;¹ or, having once appointed him, though [* 530] in ignorance of his unsuitableness in *this respect, no power to remove him except for cause arising after his appointment.

§ 243. **Renunciation of the Right to Administer.**—The preference given by statute may be waived or renounced. Unless it is, the appointment of any other person is irregular, and will be vacated upon demand of a person having the preference.² The renunciation may be spontaneous,³ or upon citation by some person interested;⁴ and it will be presumed—that is, the exclusive right to administer will be deemed—to have been waived, if letters are not applied for by the party preferred within the period prescribed for such purpose by statute.⁵ But until letters have been granted to some one else, such person may still apply and demand letters, although the statutory period may have expired.⁶ Renunciation should be in writing and entered of record: a mere parol renunciation does not amount to a waiver of the right.⁷ And where the renunciation is coupled with a condition, which condition is not performed, the parties renouncing are not thereby bound, but may insist on their prior right.⁸ Citation to parties having a prior right to administer cannot ordinarily be issued before the expiration of the period fixed by statute within which they must make application.⁹

The right to administer may be renounced,

or waived.

¹ Estate of Brown, 11 Phila. 127; but the appointment of a surviving partner as administrator of the deceased partner's estate, even against the direct inhibition of the statute, cannot be impeached collaterally: Estate of Altemus, 32 La. An. 364; and in Pennsylvania a child of decedent adversely interested and on unfriendly terms with the others (who were otherwise disqualified) will be rejected and letters granted to a stranger: Schmidt's Estate, 183 Pa. St. 129.

² Mullanphy v. County Court, 6 Mo. 563; Muirhead v. Muirhead, 6 Sm. & M. 451; Munsey v. Webster, 24 N. H. 126; Cobb v. Newcomb, 19 Pick. 336; Curtis v. Williams, 33 Ala. 570; Curtis v. Burt, 34 Ala. 729; Brodie v. Mitchell, 85 Md. 516.

³ McClellan's Appeal, 16 Pa. St. 110; Williams's Appeal, 7 Pa. St. 259; Cobb v. Newcomb, *supra*.

⁴ Arnold v. Sabin, 1 Cush. 525, 528.

⁵ Grantham v. Williams, 1 Ark. 270; Forrester v. Forrester, 37 Ala. 398; Wheat v. Fuller, 82 Ala. 572; Atkinson

v. Hasty, 21 Neb. 663, 666; Garrison v. Cox, 95 N. C. 353, 356; Withrow v. DePriest, 119 N. C. 541.

⁶ Cotton v. Taylor, 4 B. Mon. 357; Jordan v. Ball, 44 Miss. 194, 201.

⁷ Muirhead v. Muirhead, *supra*; Arnold v. Sabin, *supra*; Barber v. Converse, 1 Redf. 330; Williams v. Neville, 108 N. C. 559, 561.

⁸ All the next of kin having renounced in favor of the eldest among them, if he could find security, the appointment of his nominee, on his failing to obtain security, was held void: Rinehart v. Rinehart, 27 N. J. Eq. 475. So a widow, renouncing in favor of a particular person, is not bound by the renunciation if this person is not appointed: McClellan's Appeal, 16 Pa. St. 110, 116; and a widow renouncing her right as administratrix, is nevertheless, on the discovery of a will, entitled to letters *cum testamento annexo*, if the executor do not qualify: Brodie v. Mitchell, 85 Md. 516.

⁹ So enacted by statute in Missouri: Rev. St. §§ 7-9.

Under an established rule of the English ecclesiastical courts, no letters will be granted to any person in derogation of the right of those having priority, unless such parties are cited, or consent, even where the party who has the right has no interest in the property to be administered; ¹ but this rule * is not invariably applied [* 531] to cases where the selection is in the discretion of the court.²

In America the rule is the same. Before any one can be appointed administrator, who is not in the preferred class, notice must be given to those having a prior right, to appear and claim their privilege, or show cause why the applicant should not be appointed.³ To dispense with the citation, those having the preference should renounce their claim, or signify their consent to the grant of the petitioner's request by indorsement upon the petition, or some other writing of record.⁴ But no notice is necessary to the other parties but not by applicants in the same class. may be made *ex parte* to any of those who are equally entitled.⁵ Accordingly, letters granted to strangers, or to persons having no preference under the statute, without notice to those being preferred, will, upon the application of those having the right, be revoked, in order that the grant may be made in accordance with the statute; ⁶ but such grant is no ground for revocation if the party applying therefor had notice of the original grant, either construc-

¹ Wms. Ex. [448], citing Goods of Barker, 1 Curt. 592, and Goods of Currey, 5 Notes of Cas. 54, and adding in a note: "When the next of kin is of unsound mind, the practice is that his next of kin must also be cited, in order that they may take administration for his use and benefit if they think proper": Windeatt v. Sharland, L. R. 2 P. & D. 217.

² Wms. Ex. [448], citing Goods of Rogerson, 2 Curt. 656; Goods of Southmead, 3 Curt. 28; Goods of Widger, 3 Curt. 55; Goods of Hardinge, 2 Curt. 640.

³ Ramp v. McDaniel, 12 Oreg. 108, 113. The citation may be by personal service, or by posters, or newspaper publication, as prescribed by statute or the rule of court. In South Carolina it has been published by being read in church by an officiating clergyman. Sargent v. Fox, 2 McCord, 309; Succession of Talbert, 16 La. An. 230; Torrance v. McDougald, 12 Ga. 526; Matter of Batchelor, 64 How. Pr. 350.

⁴ Schoul. Ex. § 112.

⁵ Peters v. Public Administrator, 1 Bradf. 200. Raney, J., in delivering the opinion in Robinson v. Epping, 24 Fla. 237, says, on p. 256: "The purpose of the citation and its publication is to lay the foundation for going outside the favored class, . . . and not to fix the right as between persons not belonging to the favored class." But in New Jersey, ten days notice must be given to those equally entitled before the court can act: Sayre v. Sayre, 48 N. J. Eq. 267.

⁶ Rollin v. Whipper, 17 S. C. 32; Estate of Wooten, 56 Cal. 322, 326; Owings v. Bates, 9 Gill, 463, 467; Kelly v. West, 80 N. Y. 139, 145; Gans v. Dabergott, 40 N. J. Eq. 184. Such letters are, however, not void; hence there is no error in refusing to grant letters to one who had a prior right, until the administrator previously appointed be removed: Jones v. Bittinger, 110 Ind. 476; Garrison v. Cox, 95 N. C. 353, 355. And see further on this subject, *post*, § 262, p. * 564.

tively in the mode prescribed by the statute,¹ or actually in any method,² or failed to apply within the time required by the statute,³ or actually renounced the right;⁴ nor can there be such revocation, except for cause otherwise, where the court has made [* 532] *the appointment in the exercise of its statutory jurisdiction in selecting one or more from a class equally entitled.⁵

In Maryland no notice is required to a party preferred if he be out of the State;⁶ nor is the largest creditor, there being none of the preferred class, entitled to notice;⁷ and in New York the public administrator need only notify such relatives of the decedent as are entitled to a share of the estate.⁸

§ 244. **Effect of Renunciation or Waiver.** — If the person, or all of a class of persons, entitled by preference, have waived or renounced their privilege, it becomes the duty of the court to appoint the one, or one or more of a class, having the next right, if there be such;⁹ the discretion to select between several equally entitled being governed by the same considerations as if no renunciation or waiver had occurred,¹⁰ limited, however, to the applicants before the court, because the court has no right to reject an applicant on the mere ground that there may be others equally entitled who are better qualified.¹¹

Same rules applicable to next class in preference.

Where the husband, widow, or next of kin resides abroad, it is usual, in England, to grant administration to his nominee;¹² and this rule is followed in the United States where the statutes do not prohibit it.¹³ So a

Nominee of one preferred and renouncing may be appointed, if there be no

¹ *Per* Waldo, C. J., in *Ramp v. McDaniel*, 12 Ore. 108, 116.

² *Davis v. Smith*, 58 N. H. 16.

³ *Grantham v. Williams*, 1 Ark. 270; *Spencer v. Wolfe*, 49 Neb. 813; *Cotton v. Taylor*, 4 B. Mon. 357; *Jordan v. Ball*, 44 Miss. 194, 201; *Forrester v. Forrester*, 37 Ala. 398; but see *Gans v. Dabergott*, *supra*.

⁴ *Estate of Keane*, 56 Cal. 407, 409; *Kopper v. Coerver*, 57 Mo. App. 71. The renunciation cannot be retracted after letters have been issued to another; *Pollard v. Mohler*, 55 Md. 284; *Glenn v. Reid*, 74 Md. 238; *In re Bedell*, 97 Cal. 239; *Keith v. Proctor*, 114 Ala. 676 (case of executor); even when such letters are subsequently revoked: *Lutz v. Mahan*, 80 Md. 283.

⁵ *Brubaker's Appeal*, 98 Pa. St. 21, 24, citing *Shomo's Appeal*, 57 Pa. St. 356; *Hawkins v. Robinson*, 3 T. B. Mon. 143, 145.

⁶ *Ehlen v. Ehlen*, 64 Md. 360, 362.

⁷ *McGuire v. Rogers*, 71 Md. 587.

⁸ And failure to give notice can only be taken advantage of by those entitled to the notice: *Matter of Brewster*, 5 Dem. 259.

⁹ *Lathrop v. Smith*, 24 N. Y. 417, 420; *Atkins v. McCormick*, 4 Jones L. 274.

¹⁰ *Ante*, § 242.

¹¹ *Halley v. Haney*, 3 T. B. Mon. 141, 142; *Wright v. Wright*, Mart. & Y. 43. One who applies first must be appointed, unless the later applicant has a better right: *Succession of Petit*, 9 La. An. 207; *Succession of Nicolas*, 2 La. An. 97. But the application need not be a direct personal one; the appointment may be, after citation, to another, without a new citation: *Mandeville v. Mandeville*, 35 Ga. 243, 246.

¹² *Wms. Ex.* [438].

¹³ *Smith v. Munroe*, 1 Ired. L. 345, 351, citing *Ritchie v. McAuslin*, 1 Hayw. 220; *Estate of Robie*, Myr. 226, and *Estate of Cotter*, Myr. 179, affirmed in 54 Cal. 215; *In re Dorris*, 93 Cal. 611 (all of these California cases preferring the non-resi-

other having preference. stranger may be appointed at the request of one * having himself the preference, if there be no [* 533] others having preference over the stranger so appointed, or if all there be of such acquiesce.¹ But the right given by the statute cannot be delegated;² the widow, or any of those entitled by preference, may renounce their right, but when they do so, the power to appoint under the regulations of the statute, and the duty to exercise the discretion thereby conferred, is still in the probate court: hence the person renouncing cannot substitute another person and demand his appointment.³ But while the court is in no wise bound by the nomination of the party having renounced, yet the wishes and preferences of those whom the statute points out as the fittest persons to administer the estate will have great weight in guiding the discretion of the court.⁴

The wishes of the party preferred will be considered by the court to guide the exercise of its discretion.

Agreements to transfer the right of administration from those entitled under the statute to other parties, for a consideration, — for instance, of receiving from such party the commissions to be al-

dent widow's nominee to the public administrator); *Little v. Berry*, 94 N. C. 433, 437. In California the nominee of a non-resident wife is preferred to a brother of the decedent: *In re Stevenson*, 72 Cal. 164; but not where she has remarried, since in such case she loses her status as surviving wife: *In re Allen*, 78 Cal. 581, 585; and the nominee of a resident brother, whose appointment was contested by the public administrator, who was found to be a foreigner by birth, not able to become a citizen of the United States, was held, in the exercise of discretion vested in the court, not entitled as against the public administrator: *Estate of Yee Yun*, Myr. 181. One not entitled to administer, by reason of non-residence, has no authority, in the absence of statutory provision, to select another to represent him: *Long v. Huggins*, 72 Ga. 776, 790; *Sutton v. Public Administrator*, 4 Dem. 33; *In re Muersing*, 103 Cal. 585; but in *Frick's Appeal*, 114 Pa. St. 29, 35, the court says: "Generally, it is the duty of the register to regard the expressed will of the parties entitled to the estate, whether they reside within or without the State, and if they are incompetent the trust should be committed to their nominee, if a fit person." In California, by statute, letters may be granted to persons not

otherwise entitled, at the written request of the person entitled; but this does not entitle a guardian, who has the right to administer for his minor ward, the right to confer such authority on another: *In re Woods*, 97 Cal. 428. In Montana the surviving husband or wife is by statute entitled to nominate the administrator in his or her place, and this is held to apply when a widow is disqualified by reason of her minority or non-residence: *Stewart's Estate*, 18 Mont. 545.

¹ *Patterson v. High*, 8 Ired. Eq. 52, 54.

² *President, &c. v. Browne*, 34 Md. 450, 455; *McBeth v. Hunt*, 2 Strobb. 335, 341; *Ex parte Young*, 8 Gill, 285.

³ *Cobb v. Newcomb*, 19 Pick. 336; *Shomo's Appeal*, 57 Pa. St. 356; *Guldin's Estate*, 81 * Pa. St. 362; *Triplett v. Wells*, Litt. Cas. 49; *Matter of Cresse*, 28 N. J. Eq. 236; *In re Root*, 1 Redf. 257; *Sargent's Estate*, 62 Wis. 130, 135; *Tanner v. Huss*, 80 Ga. 614.

⁴ *McBeth v. Hunt*, *supra*; *Muirhead v. Muirhead*, 6 Sm. & M. 451; *Ellmaker's Estate*, 4 Watts, 34; and see authorities *supra*, p. *532, note; *McClelland's Appeal*, 16 Pa. St. 110; *Halliday v. DuBose*, 59 Ga. 268; *Frick's Appeal*, 114 Pa. St. 29, 35; *Williams v. Neville*, 108 N. C. 559; *Cramer v. Sharp*, 49 N. J. Eq. 558.

lowed by the court, — are against public policy and will not be sustained;¹ an agreement between two parties, both equally entitled, to take joint administration, and where the principal labor and responsibility would fall on one, that the other would take such portions

Traffic in appointment of administrators against public policy.

[* 534] of the commissions as his associate would *think fair was held valid;² but there can be no partnership in the office of administrator.³ That one obtaining an appointment as administrator under an agreement not to charge commissions, or to charge a certain amount, is bound thereby, is mentioned elsewhere.⁴

§ 245. **Administrators cum Testamento annexo.** — The distinction between an administrator generally and an administrator *cum testamento annexo* is, as the name implies, and as has already been remarked,⁵ that the former distributes the effects according to the law of descent and distribution, while the latter is bound in this respect by the provisions of the will. Since administration with the will annexed is granted only in default of an executor named in the will, it is necessary, before such grant can be made, that the court be fully satisfied that the executor named, if any, or where several are named, all of them,⁶ have renounced the trust, or are unwilling to serve, or incapable. No formality is necessary in making such proof,⁷ beyond the compliance with the statutory requirements on this subject; but it is necessary that the record show the renunciation, or waiver, otherwise letters *cum testamento annexo* may be declared void.⁸

No letters *cum testamento annexo* will be granted without proof that there is no executor capable or willing to act.

¹ Owings v. Owings, 1 Har. & G. 484; Brown v. Stewart, 4 Md. Ch. 368; Bowers v. Bowers, 26 Pa. St. 74; Ellicott v. Chamberlain, 38 N. J. Eq. 604, 609; Porter v. Jones, 52 Mo. 399. But an agreement whereby one joint executor renounced his right to letters testamentary in favor of his co-executor, in consideration of being paid one half commissions, was held a valid agreement: Ohlendorf v. Kanne, 66 Md. 495. And a contract made subsequently to an administrator's appointment, and having no connection therewith, based on a valuable consideration, to divide future commissions is not illegal: Greer v. Nutt, 54 Mo. App. 4.

² Brown v. Stewart, 4 Md. Ch. 368; see also Bassett v. Miller, 8 Md. 548. As to agreements concerning commissions, see *post*, § 530, p. *1172, and cases there cited.

³ Seely v. Beck, 42 Mo. 143, 148.

⁴ *Post*, § 530, p. *1172.

⁵ *Ante*, § 178.

⁶ For one of several executors qualifying has all the power vested in the several executors: Phillips v. Stewart, 59 Mo. 491; see *ante*, § 179, p. *395. And an executor has power to administer all the property of the testator, though a part of it has not been bequeathed by the will: Landers v. Stone, 45 Ind. 404. See on this latter point, *ante*, § 178, and *post*, § 229.

⁷ See *ante*, § 234.

⁸ Vick v. Vicksburg, 1 How. (Miss.) 379, 439. But the rigidity of the rule requiring jurisdictional facts to be recited in the record is now much relaxed, and if the circumstances exist which authorize the appointment, they may be proved by parol: see Peebles v. Watts, 9 Dana, 102; Thompsons v. Meek, 7 Leigh, 419, citing Geddy v. Butler, 3 Munf. 345, and Nelson v. Carrington, 4 Munf. 332, as showing that renunciation might be valid, though not shown of record; so, also, it has been held, on the ground that every presump-

In granting letters *cum testamento annexo*, the court is governed by the same principles which determine the appointment of general administrators, chief among which is, that in the absence of regulation, the right to administer follows the right to the personal property. Hence residuary legatees are preferred, in the grant of letters *cum testamento annexo*, to the next of kin¹ or widow;² and this preference extends to the *representatives of [* 535] residuary legatees who survive the testator and

have a beneficial interest, such representatives being entitled to letters *cum testamento annexo* in preference to the next of kin,³ unless otherwise determined by statute.⁴ Thus, in Massachusetts, neither the next of kin nor any other person has a *claim* to administration *de bonis non cum testamento annexo* upon the death of a sole executor.⁵ In New York, under a statute providing that, "if any person who would otherwise be entitled to letters of administration with the will annexed as *residuary* or *specific* legatee, shall be a minor, such letters shall be granted to his guardian, being in all other respects competent, in preference to *creditors or other persons*," it was held that, as against the guardian of an infant legatee, but neither residuary nor specific, the widow or other relative has preference.⁶ So where the legatee named is incompetent to administer, the

tion is in favor of the validity of probate judgments, that where an administrator *cum testamento annexo* was appointed, and the record was silent as to the removal of the executor who had regularly qualified that the new appointment implied that the court found a vacancy to exist in the office of executor; and that the appointment must be upheld unless the record affirmatively shows that there is no vacancy: *Printup v. Patton*, 91 Ga. 422, 434; and in Missouri it is held that the appointment *de bonis non* is of itself *prima facie* evidence of a vacancy; and this presumption must prevail in a collateral proceeding until clearly disproved: *Macey v. Stark*, 116 Mo. 481, 501; *Rogers v. Johnson*, 125 Mo. 202, 213; but on the death of one of two executors, the survivor still acting, the appointment of an administrator *de bonis non cum testamento annexo* does not divest the surviving executor of his powers or vacate his appointment: *Packer v. Owens*, 164 Pa. St. 185. And it was held that an executor and an administrator with the will annexed cannot be appointed at the same time; the appointment of the latter is simply void: *Terry's Appeal*, 67 Conn. 181. See also

authorities under § 234, *ante*, and the subject of collateral impeachability of the judgments of probate courts, *ante*, § 145.

¹ *Bradley v. Bradley*, 3 Redf. 512, citing *Ward in re*, 1 Redf. 254; *Russell v. Hartt*, 87 N. Y. 19; *Booraem's Case*, 55 N. J. Eq. 759.

² *Ante*, § 235. But if there be a partial intestacy, the right to the administration remains in the next of kin, since they are entitled to the unbequeathed property: *Ellmaker's Estate*, 4 Watts, 34, 38.

³ *Booraem's Case*, 55 N. J. Eq. 759; *Hendren v. Colgin*, 4 Munf. 231, preferring the husband's executor or administrator to the next of kin of the wife; *Cutchin v. Wilkinson*, 1 Call, 1, 6; *Clay v. Jackson*, T. U. P. Charl. 71. See also *Myers v. Cann*, 95 Ga. 383, 386; *Wms. Ex.* [468] and authorities.

⁴ *Williams's Appeal*, 7 Pa. St. 259; *Spinning's Will*, Tuck. 78.

⁵ *Russell v. Hoar*, 3 Met. (Mass.), 187, 190.

⁶ *Cluett v. Mattice*, 43 Barb. 417. But where the statute applies, the surrogate has no discretion: *Blanck v. Morrison*, 4 Dem. 297; *Matter of Bowne*, 6 Dem. 51.

next person named is entitled;¹ and the *cestui que trust*, not the trustee, is the real party in interest, and therefore entitled to letters *cum testamento annexo*.² In Pennsylvania the husband of an heiress is not entitled to letters *cum testamento*;³ and a power of attorney from a surviving executor, which is ten years old, was held to be too stale to authorize a grant of letters with the will annexed.⁴ In North Carolina, the court of ordinary formerly had discretionary power to appoint *any* proper person administrator with the will annexed, where there is no executor competent or willing to serve;⁵ now in this State,⁶ as well as in South Carolina, the ordinary is bound to observe the same order of preference in such case as in the case of intestacy;⁷ and if he improperly grant letters to a stranger, he will revoke the appointment at the request of one preferred.⁸ Such also is the law in California,⁹ and in Rhode Island where the statute provides for letters with the will annexed "to such person as the court shall think fit" it is held that the appointment of one not interested in the will, though he be next of kin, when there is a competent and unobjectionable legatee desirous of the appointment, is an erroneous exercise of discretion which will be set aside.¹⁰

[* 536] *In Maryland it seems that the widow is first entitled to letters *cum testamento*, next the residuary legatee, and then the next of kin; should these decline or refuse to act, and the creditors or more remote kindred do not apply, the court may use its discretion.¹¹ Where the widow of a supposed intestate renounces her right to administer, on a subsequent discovery of a will (which the executor declines to administer), she is entitled to be appointed *cum testamento*, and an appointment of the residuary legatee without notice to her is erroneous.¹² In England one named as executor cannot take letters *cum testamento*, because courts will not make a grant in an inferior character to one entitled to it in a superior character;¹³ but in Missouri it was intimated that one named as executor in the will, but disqualified by reason of being one of the subscribing witnesses, may in a proper case be appointed as administrator with the will annexed.¹⁴ So in New York an administrator with the will annexed may be appointed to succeed to the duties and trust of a

¹ Thompson's Estate, 33 Barb. 334.

² Ibid.

³ Ellmaker's Estate, 4 Watts, 34.

⁴ Bleakley's Estate, 5 Whart. 361.

⁵ Suttle v. Turner, 8 Jones L. 403; but this case seems overruled in Little v. Berry, 94 N. C. 433, and it was stated so to be in Williams v. Neville, 108 N. C. 559, 564, and subsequent cases.

⁶ Little v. Berry, *supra*. The husband has the first right; and one having a prior right to letters may transfer the right, or

cause another to be associated with him: *In re Meyers*, 113 N. C. 545.

⁷ Smith v. Wingo, 1 Rice, 287.

⁸ Smith v. Wingo, *supra*, relying upon Thompson v. Hocket, 2 Hill (S. C.) 347.

⁹ *In re Li Po Tai*, 108 Cal. 484.

¹⁰ Emsley v. Young, 19 R. I. 65.

¹¹ Dalrymple v. Gamble, 66 Md. 298, 308.

¹² Brodie v. Mitchell, 85 Md. 516.

¹³ Wms. Ex. [469], and English authorities.

¹⁴ Murphy v. Murphy, 24 Mo. 526.

deceased executor, including a trust not separable from the functions of an executor;¹ and one who unites the character of testamentary trustee with that of executor may be removed as trustee, and continue to act as executor.² Where the testatrix named no executor, it was held that oral expressions of a preference by the testatrix were entitled to weight in making the selection, other things being equal.³

§ 246. **Administrators of Estates of Non-Residents.** — It appears from the chapter on Domiciliary and Ancillary Jurisdiction,⁴ that, in consequence of the extra-territorial invalidity of letters testamentary and of administration, the authority to sue or defend as executor or administrator must be conferred by the law of the forum in which they appear.⁵ It has also been mentioned under what circumstances jurisdiction is conferred to grant letters on the estates of deceased

Appointment of an administrator of the estate of a non-resident decedent is independent of the grant of domiciliary letters.

non-residents,⁶ and under which wills of non-residents obtain validity in the several States,⁷ and that it is not necessary that the will of a non-resident testator should be first proved in the State of his domicile,⁸ or that administration should first be granted there before the appointment of an administrator in the State where administration may be desired. The powers of one so ap-

pointed are in no manner impaired or affected by the previous grant of administration in the State of the domicile.⁹ Since the law of the * domicile at the time of an intestate's death governs the [* 537] devolution of personal property, the selection of an administrator will be affected, to some extent, by such law; but in other respects there is no essential difference in the rules governing the grant of letters on the estates of deceased residents and non-residents. It has also been pointed out, that by the comity of States the person who obtains administration in the State of the domicile, or his attorney, is entitled to a similar grant in any other jurisdiction where the deceased has personal property,¹⁰ unless such person is disqualified by the law of the ancillary forum.

§ 247. **Administrators de Bonis Non.** — If a sole or all of several executors or administrators die, or resign, or be removed from office before the estate is fully administered, it becomes necessary to appoint an administrator *de bonis non* — simply, or with the will annexed, as the case may be — to complete the administration. The circumstances under which such letters are granted, as well as the

¹ Matter of Clark, 5 Redf. 466.

⁷ *Ante*, § 226.

² Quackenboss v. Southwick, 41 N. Y.

⁸ *Ib.*

117; Hallock v. Rumsey, 22 Hun, 89.

³ Matter of Powell, 5 Dem. 281.

⁹ Henderson v. Clark, 4 Litt. 277;

Cosby v. Gilchrist, 7 Dana, 206; Pond v.

⁴ *Ante*, §§ 157-169.

Makepeace, 2 Met. (Mass.) 114. And see

⁵ Taylor v. Barron, 35 N. H. 484, and numerous authorities cited on p. 495;

ante, § 158; Burnley v. Duke, 1 Rand. 108, 112.

Naylor v. Moffatt, 29 Mo. 126.

¹⁰ *Ante*, § 158.

⁶ *Ante*, § 205.

powers and duties of the officers so appointed, have been fully considered in connection with the subject of administrators generally ;¹ it is sufficient, therefore, to recapitulate, in this connection, that there must be an estate remaining unadministered,² and a vacancy in the office of executor or administrator,³ otherwise there can be no grant of letters *de bonis non*. The considerations governing the preference in ordinary cases govern also in respect of administrators *de bonis non*, whether of testate or intestate estates,⁴

No administrator *de bonis non*, unless there be unadministered assets and a vacancy in the office of administrator.

except as otherwise indicated by statutory rules. In New [* 538] York, for instance, the statute is held to provide * that, upon the death of a sole executor *after* having qualified, the widow or next of kin is entitled to letters *de bonis non* ; but if he died *before* qualifying, then the residuary legatee is entitled as against the widow and next of kin.⁵ In Maryland, the female cousin-german on the father's side is preferred to the male cousin-german on the mother's side, for general letters as well as for letters *de bonis non*.⁶ In Massachusetts, upon the death of a sole executor or administrator, neither widow nor next of kin has a right to the administration *de bonis non*, but the judge of probate appoints in his discretion ;⁷ but the reverse is held in Maryland, where the Orphan's Court is governed by the same rules of preference which govern in the original grant of administration.⁸ In Mississippi, upon the resignation of an executor or administrator, the court may appoint his successor at once, without citation to the parties in interest.⁹ In California, it is held that one who was rejected as not being entitled to administration originally may nevertheless be granted administration *de bonis non*, after the removal of the original administrator.¹⁰

§ 248. **Administrators with Limited Powers.** — It will appear from a previous passage,¹¹ that limited administrations may be

¹ *Ante*, § 179.

² It is not sufficient that there was no regular final settlement and discharge of the executor or administrator. Where the property of an estate was turned over to a legatee, the executor removed, and sixteen years elapsed, an application for administration *de bonis non* by one showing no interest in the estate, and resisted by the legatee, will be refused: *San Roman v. Watson*, 54 Tex. 254, 259. But if a final settlement be set aside in chancery, for the allowance of a fraudulent item of credit, the administration must be completed by the appointment of an administrator *de bonis non* in the probate court: *Byerly v. Donlin*, 72 Mo. 270. To same effect, *Neal v. Charlton*, 52 Md. 495, citing numerous Maryland cases.

³ *Ante*, § 179, p. * 395. The grant of letters *de bonis non* upon the death of an executor, pending an appeal from the probate of the will, is erroneous, but not assailable in a collateral proceeding; but such appointment before the death of the executor would be void: *Finn v. Hempstead*, 24 Ark. 111, 116.

⁴ *Schoul. Ex.* § 129.

⁵ *Bradley v. Bradley*, 3 Redf. 512. But if no one having superior right apply, the next of kin may in such case be appointed: *Cobb v. Beardsley*, 37 Barb. 192.

⁶ *Kearney v. Turner*, 28 Md. 408, 423.

⁷ *Russell v. Hoar*, 3 Met. (Mass.) 187.

⁸ *Thomas v. Knighton*, 23 Md. 318, 325.

⁹ *Sivley v. Summers*, 57 Miss. 712, 731.

¹⁰ *Estate of Pico*, 56 Cal. 413, 420.

¹¹ *Ante*, § 184.

granted under certain circumstances, although discouraged by courts and text-writers in America,¹ because here the tendency is to commit administration at once to those who may be under no present disability, with full authority to complete the settlement of the estate without disturbing the course of administration by placing it in the hands of persons claiming a superior right. But the authority to appoint administrators *ad colligendum, ad litem, durante absentia,*

The rule in ordinary cases, that the appointment should go to the ultimate beneficiary, is not applicable to special administrators.

durante minore ætate, or for some special purpose, is sometimes resorted to.² The rules governing the court in selecting proper persons for appointment in such cases are necessarily different from those controlling the appointment of general administrators, because the fundamental principle of having the administration follow the right of property is *inapplicable. The [* 539] discretion of the court seems to be limited only

by the bounds of propriety, and extends to any discreet, qualified person. It is held in New York that the surrogate may limit the authority of an administrator appointed to do certain acts and no others, although the statute did not expressly authorize such limitation.³ It is evident, however, that a general administrator regularly appointed succeeds to all the rights and powers of a special administrator, as much so as an administrator *de bonis non* succeeds to the unadministered effects of the intestate.⁴ In Missouri, where the statute authorizes the probate court to appoint an administrator to take charge of the estate during a contest of the will,⁵ it is held that this authority implies the power to suspend, during such contest, the authority of an administrator *cum testamento annexo*, as well as that of an executor; that authority to grant letters "to some other person" means the appointment of a person other than the one charged with the execution of the will, whether named in the will or not; and that the statute preferring the widow in the grant of administration generally has no application in such case.⁶

¹ 3 Redf. on Wills, 113, pl. 5.

² *Ante*, §§ 182-184.

³ *Martin v. Dry Dock*, 92 N. Y. 70, 74.

⁴ *Cowles v. Hayes*, 71 N. C. 230, citing

Eure v. Eure, 3 Dev. 206, and *Cutlar v. Quince*, 2 Hayw. 60.

⁵ *Rogers v. Dively*, 51 Mo. 193.

⁶ *Lamb v. Helm*, 56 Mo. 420.

[* 540]

* CHAPTER XXVII.

OF THE ADMINISTRATION BOND.

§ 249. **Origin of the Law requiring Administration Bonds.** — The English statute,¹ requiring bond to be given to the ordinary upon committing administration of the goods of any person dying intestate, is incorporated into the statutes of every State in the Union. So great has at all times been the anxiety of legislators and judicial tribunals in this country to protect the just demands of creditors on the one hand, and to vindicate the lawful inheritance and dower to the widow and next of kin, on the other, and so appropriate and efficient in accomplishing this desired end is the administration bond considered to be, that not a single State has ever ventured upon the experiment of substantially changing the law in this respect. The form of such a bond, enacted "*anno vicesimo secundo et tertio Caroli II.*," corresponds substantially to the form required by our modern statutes, even to the "two or more able sureties" demanded. The only noticeable change made in England, as embodied in the Probate Court Act,² is the provision fixing the minimum of the penalty, in recognition of the American precedent on the subject, at double the value of the estate. The law in the several States is uniform on this point, requiring the administrator, whether with the will annexed, *de bonis non*, temporary, or permanent, to give bond with two or more sufficient sureties, in a sum at least double the value of such personal property as may come into his possession belonging to the estate of the decedent; with the exception of Louisiana, where the minimum is fixed at "one-fourth beyond the estimated value of the movables and immovables, and of the credits comprised in the [* 541] inventory * exclusive of bad debts,"³ Mississippi, where it must equal the value of the personal estate at least,⁴ and Florida, where the amount of the penalty is in the discretion of the judge.⁵ In Pennsylvania, an administration where no bond is given is by statute declared void,⁶ and there, as well as in South Carolina,

English statute of 22 & 23 Car. II., substantially adopted in all States.

Penalty of the bond double the amount of the property administered; except in a few States.

¹ 21 Henry VIII. c. 5, § 3; 22 & 23 Car. II. c. 10, § 1.

² 20 & 21 Vict. c. 77.

³ Civ. Code, 1888, art. 1127.

⁴ Ann. Code, 1893, § 1852.

⁵ Rev. St. 1892, § 1863.

⁶ Act of March 15, 1832, § 27.

Probate judge the register or ordinary neglecting to take the administration bond is liable for all damages; and although the damages do not appear to result from the neglect, yet the law will presume so.¹ But usually the letters are not void, but voidable for failure to give the bond.²

§ 250. **Bonds of Executors.**—But under the English law executors derive their authority from the will, and not from the grant of the ordinary, or probate court; hence in England executors are not required to give bond.³ The same rule, perhaps for the same reason, prevails in Florida,⁴ Georgia,⁵ Louisiana,⁶ New York,⁷ North Carolina,⁸ Pennsylvania,⁹ and South Carolina,¹⁰ in which States executors are permitted to administer on the estates of their testators without giving an administration bond. In other States, no distinction is made in the matter of requiring bonds between administrators and executors, unless the testator expressly direct, by provision in the will, that the executors by him appointed shall not be required to give bond, in which case the desire of the testator is complied with, unless the court, upon complaint of some creditor, legatee, or other person interested, or even upon its own knowledge, suspect that the estate would be fraudulently administered or wasted, when it is made the duty of the court to cite the executor to show cause why bond should not be given, and in its discretion compel it, or refuse letters. Such is the law in Alabama,¹¹ California,¹² Colorado,¹³ Connecticut,¹⁴ Illinois,¹⁵ Kansas,¹⁶ Kentucky,¹⁷ Maine,¹⁸ Mississippi,¹⁹ Missouri (since November 1, 1879),²⁰ Nevada,²¹ Ohio,²² * Oregon,²³ Rhode Island,²⁴ Tennessee,²⁵ [* 542] Texas,²⁶ Vermont,²⁷ Virginia,²⁸ West Virginia,²⁹ and Wisconsin.

¹ *Boggs v. Hamilton*, 2 Mill (S. C.), 381.

² See *post*, § 253.

³ *Lomax, Ex. & Adm.* 171 (s. p.); 4 Burns, Eccl. L. 176.

⁴ Rev. St. 1892, § 1862.

⁵ Code, 1895, § 3315.

⁶ Unless there be debts due by the estate or property claimed by other parties, in which case the party claimant may compel the testamentary executor to give security for an amount exceeding by one-fourth the amount claimed by him: *Voorh.* Rev. Code, 1888, art. 1677, pl. 2.

⁷ Code, Civ. Pr. § 2638; *Demarest's Estate*, 1 Civ. Pr. Rep. 302.

⁸ Rev. Code, 1883, § 1515.

⁹ *Pep. & L. Dig.* 1896, p. 1463, §§ 71, 81.

¹⁰ Rev. St. 1893, §§ 2013 *et seq.*

¹¹ Code, 1896, § 66.

¹² Code, Civ. Pr. §§ 1388, 1396.

¹³ Ann. St. 1891, § 4690.

¹⁴ Gen. St. 1888, § 548.

¹⁵ St. & C. Ann. St. 1896, p. 271, ¶ 7.

¹⁶ Gen. St. 1897, p. 517, §§ 3, 4.

¹⁷ St. 1894, § 3837.

¹⁸ Rev. St. 1883, ch. 64, § 9.

¹⁹ Ann. Code, 1893, § 1836.

²⁰ Rev. St. 1889, § 12.

²¹ Gen. St. 1885, § 2746.

²² *Bates' Ann. St.* 1897, §§ 5996, 5997.

²³ Code, 1887, § 1088.

²⁴ Gen. L. 1896, p. 749, §§ 1, 5.

²⁵ Code, 1884, §§ 3063, 3066.

²⁶ Rev. St. 1895, art. 1946.

²⁷ *Felton v. Sowles*, 57 Vt. 382.

²⁸ Code, 1887, § 2642.

²⁹ Code, 1891, ch. 85, § 7.

sin.¹ It is obvious that the exemption in these States is based upon the testator's right to dispose of his property in the manner deemed best by him, saving the rights of creditors and of those having legal claims upon him; which includes the power to exempt from the necessity of giving bond, as a method of gift to the executor. From this it follows, that the exemption in such cases is personal to the executor named in the will, becoming inoperative on the failure or refusal of such person to accept the trust, and has no application to other executors or administrators.² But in other States the requirement to give bond before an executor can lawfully take charge of an estate is as imperative and absolute as it is upon administrators; so in Arkansas,³ Delaware,⁴ Iowa,⁵ Indiana,⁶ and Maryland.⁷ In several of the States where resident executors are not required to give bond, a discrimination is made against non-resident executors, requiring them to give bond and account, in default of which administrators with the will annexed are appointed, either originally, or, after removal of the executor, *de bonis non*.⁸

Such exemption applies only to executors nominated by the testator.

States in which executors are required to give bond.

[* 543] * § 251. **Power of Court to order Bond.** — In those of the States in which an executor is permitted to administer without giving bond, whether the exemption arise under the statute or by express direction of the testator, his

Court may order bond to

¹ Ann. St. 1889, § 3795.

² Langley v. Harris, 23 Tex. 564, 570. See also Fairfax v. Fairfax, 7 Gratt. 36, in which it is held that the expression of confidence in connection with the appointment of executors in the body of the will, exempting them from the requirement to give bond, and the appointment of a further executor in a codicil, did not constitute an exemption to the last-named executor. The same principle is involved in *Ex parte Brown*, 2 Bradf. 22; *Commonwealth v. Forney*, 3 W. & S. 353, 357.

⁸ Dig. of St. 1894, § 43. But in this State it was nevertheless held that, although the clerk could not issue letters without taking bond, yet there might be cases where the court might dispense with it; in the case, for instance, of a sole heir or legatee being appointed executor when there are no debts, because waste or mismanagement of the estate would be guarded against by motives of self-interest, and in any event could injure no one but himself: *Bankhead v. Hubbard*, 14 Ark. 298, 300. It will be observed that this reasoning applies as fully to intestate estates, where

there is but one heir, as to residuary legatees.

⁴ Rev. Code, Amended, 1874, ch. 89, § 14.

⁵ McClain's, Ann. Code, § 3563.

⁶ Ann. St. 1894, § 2397.

⁷ In this State, if the testator so express, the court may require bond only to protect creditors: *Publ. Gen. L.* 1888, art. 93, § 41.

⁸ So in Louisiana: *Rev. St.* 1876, § 1461; *Succession of Davis*, 12 La. An. 399; *Succession of McDonough*, 7 La. An. 472; *Yerkes v. Broom*, 10 La. An. 94; *Succession of Bodenheimer*, 35 La. An. 1034. In New Jersey applicants for probate of a will who reside out of the State are required to give bond for faithful administration: *Gen. St.* 1896, § 195, p. 2401. In New York: *Code Civ. Pr.* § 2638. In North Carolina: *Rev. Code*, 1883, § 1515. In Pennsylvania: *Pep. & L. Digest*, 1896, p. 1469, § 81. In Texas, a resident, but not a non-resident, executor may be exempted by the testator from giving bond: *Sayles' Civ. St.* 1897, art. 1922, 1923.

be given,
although the
testator direct
otherwise.

office is one of special trust and confidence, for which reason no bond is required of him. But if a court become satisfied that the executor, who was solvent when named in the will, is likely to become insolvent, and that there is danger that he may abuse his trust, or has ground to suspect that he will indirectly and fraudulently administer the estate to the prejudice of creditors or legatees, he will be ordered to give bond with sufficient surety to protect the estate.¹ In such case any person who has an interest in the estate may interpose to move for an order requiring security,² and when the interest is averred positively and under oath it cannot be questioned on the trial of an application for security.³ And a bond given by an executor without sureties, although approved by the judge of probate, is not such a bond as the law contemplates.⁴

§ 252. **Circumstances rendering Bond necessary.**—It is not possible to define with accuracy the precise circumstances which should

Facts deemed
sufficient by
courts to
authorize
requirement
of bond.

induce the probate court to demand sureties from an executor who is otherwise exempt under the law or the direction of the testator. Of these the probate judge must necessarily be the primary, and in most cases the sole arbiter, since an appellate court will not interfere with the exercise of his discretion unless his decision be plainly in conflict with the letter or spirit of the law.⁵ The several statutory provisions on the subject have been elucidated in a slight degree only by judicial interpretations, which are usually paraphrases of the statute, and announcements that each case * presented must depend upon its own peculiar features and [* 544] circumstances, of which the probate court is the appropriate judge. The single object to be achieved is the safety of the estate in the executor's hands, and its faithful administration according to the intention of the testator so far as the same is sanctioned by law. If the probate judge is satisfied that this will be accomplished without bond, then no bond is required. But if he have reason to suspect the integrity, the mental capacity, or even the financial ability of the executor, he should protect the estate and the interests of

¹ *Bellinger v. Thompson*, 26 Oreg. 320, 334; *per Rogers, J.*, in *Commonwealth v. Forney*, 3 W. & S. 353, 355; *Clark v. Niles*, 42 Miss. 460; *Atwell v. Helm*, 7 Bush, 504; *Wood v. Wood*, 4 Pai. 299; *Holmes v. Cock*, 2 Barb. Ch. 426; *Mandeville v. Mandeville*, 8 Pai. 475; *Colgrove v. Horton*, 11 Pai. 261; *Freeman v. Kellogg*, 4 Redf. 218, 224; *Holderbaum's Estate*, 82 Iowa, 69.

² For instance, a creditor: *Smith v. Phillips*, 54 Ala. 8; the proponent of a will who is executrix and legatee under an

alleged later will than that admitted to probate: *Cunningham v. Souza*, 1 Redf. 462; and *a fortiori*, a legatee: *Sullivan's Will*, Tuck. 94; *Felton v. Sowles*, 57 Vt. 382, 383.

³ *Merchant's Will*, Tuck. 17; *Smith v. Phillips*, *supra*; *Cotterell v. Brock*, 1 Bradf. 148.

⁴ *Abercrombie v. Sheldon*, 8 Allen, 532.

⁵ *Hempstead, J.*, in *Bankhead v. Hubbard*, 14 Ark. 298, 300; *Grigsby v. Cocke*, 85 Ky. 314; and in Vermont is not applicable: *Felton v. Sowles*, 57 Vt. 382.

those concerned in it by an order requiring bond with sufficient sureties. The mere *poverty* of an executor, which existed at the time of the testator's death, without maladministration or loss or danger of loss from misconduct or negligence, does not authorize the requirement of a bond;¹ nor the fact that an executor is not possessed of property of his own equal in value to that of the estate he is to administer, if there is no ground to fear that the trust funds in his hands are in danger from improvidence and want of pecuniary responsibility.² An application to compel security from an executor upon the ground of his pecuniary irresponsibility should not be entertained, unless it states particulars from which it will *prima facie* appear that the estate of the testator will not be safe in the executor's hands.³ Insolvency is not *per se* a sufficient ground to require bond from executors, when it has not arisen since the appointment by the testator.⁴ In the New York statute, the word "precarious" is used; "if the circumstances of the executor are so *precarious* as not to afford adequate security for the administration of the estate," etc. This word is held not to be applicable to the wealth or poverty of the executor, although it might be to his bankruptcy.⁵ On the other hand, it is held that the solvency of [* 545] the *executor is no reason why bond should not be exacted if he is guilty of mismanagement.⁶ But where other circumstances concur, and insolvency arises *after* the appointment by the testator, it may become decisive on the question of ordering security to be given.⁷ In Oregon it has been decided that execu-

Mere poverty of executor not sufficient.

Insolvency is not *per se* sufficient.

Nor is the solvency of the executor a sufficient reason why bond shall not be required, if guilty of mismanagement.

¹ Where, under such circumstances, a court of equity required bond from an executor, the Supreme Court of North Carolina annulled the order, and directed the bond to be surrendered: *Fairbairn v. Fisher*, 4 Jones Eq. 390.

² The surrogate's decree, requiring bond under these circumstances, was reversed by Chancellor Walworth: *Mandeville v. Mandeville*, 8 Pai. 475.

³ *Colgrove v. Horton*, 11 Pai. 261, reversing order of surrogate requiring bond.

⁴ *Willson v. Whitfield*, 38 Ga. 269; *Bowman v. Wootton*, 8 B. Mon. 67.

⁵ "The experience of the world," says Potter, J., delivering the opinion of the Supreme Court of New York in *Shields v. Shields*, 60 Barb. 56, 60, "if appealed to, would demonstrate the truth that it is not those who have most means in possession that are found to be the safest and best

trustees." To the same effect, *Cotterell v. Brock*, 1 Bradf. 148.

⁶ *McKenna's Appeal*, 27 Pa. St. 237; *Shields v. Shields*, *supra*.

⁷ Thus, where two of the three executors appointed by the testator had died, and the third had become insolvent, the order of the surrogate requiring security in double the value of the personal property, including the possible proceeds of real estate which the executor had power to sell, was affirmed: *Holmes v. Cock*, 2 Barb. Ch. 426. And where an executrix married a man who was insolvent, and who had conveyed by deed to his own children all the property he had, and had mortgaged a negro belonging to the estate his wife was administering, for a private debt of his own, the decree of the chancellor dismissing the bill to compel security was reversed unanimously, and security ordered to be given: *Powel v. Thompson*, 4 Desaus.

tors in whom a legal estate is vested merely for the purpose of sale and conveyance are not required to qualify fully, or to report their proceedings to the probate court.¹

§ 253. **Invalidity of Administration without Bond.**—Neither the office of administrator, nor in cases where the executor is required to give bond, that of executor, can be regarded as filled until the administration bond is actually given;² and they cannot act as such until they have qualified themselves by taking the oath of office and giving the necessary bond.³ If the bond is not given when required by the probate court, although the will direct that no bond shall be taken, the court may revoke the letters testamentary.⁴ And one who, having been appointed administrator, fails to give [* 546] the bond, cannot afterward intervene in a contest between creditors for administration.⁵ In Pennsylvania this rule has been so rigorously construed, that one who acted under letters of administration otherwise properly granted, but who had given bond with one surety where the law required two, was held to act as administrator of his own wrong, the bond being held void, and the letters likewise.⁶ And so where an administrator *de bonis non* gave bond containing the conditions of an administrator's bond in chief, it was held void.⁷ In Massachusetts it is intimated that administration without bond is void;⁸ but usually the failure of the adminis-

162. So where the executor was a single man, without visible property except a claim against the testator's estate for services rendered his father after reaching majority, where the trust was to continue for nearly twenty years and the executor was about to remove out of the State, the chancellor reversed the decision of the surrogate permitting administration without security on the ground that these circumstances were sufficient to require security for the faithful administration of the estate independent of the statutory provision requiring security in cases where the executor was, or was about to become, a non-resident: *Wood v. Wood*, 4 *Pai.* 299, 302. See also *Felton v. Sowles*, 57 *Vt.* 382; *Bromberg v. Bates*, 112 *Ala.* 363.

¹ *Hogan v. Wyman*, 2 *Oreg.* 302.

² *Feltz v. Clark*, 4 *Humph.* 79; *O'Neal v. Tisdale*, 12 *Tex.* 40; *Commonwealth v. Forney*, 3 *W. & S.* 353; *Ex parte Brown*, 2 *Bradf.* 22; *Gardner v. Gantt*, 19 *Ala.* 666; *Drane v. Bayliss*, 1 *Humph.* 174; *Succession of Bodenheimer*, 35 *La. An.* 1034.

³ *Cleveland v. Chandler*, 3 *Stew.* 489; *Echols v. Barrett*, 6 *Ga.* 443; the refusal

of an executor to qualify is *prima facie* evidence of his refusal to act: *Uldreck v. Simpson*, 1 *S. C.* 283. Letters are not invalid because the bond is made and signed before appointment; *Morris v. Chicago*, *R. I. & P. R. R.*, 65 *Iowa*, 727; or because the bond is not presented for approval until several days after issuance of the letters and taking of the oath: *Ions v. Harbison*, 112 *Cal.* 260.

⁴ *Post*, § 270; *Clark v. Niles*, 42 *Miss.* 460. But such order is not final until it is enforced, and hence cannot be appealed from: *Atwell v. Helm*, 7 *Bush*, 504.

⁵ *Howard v. Worrill*, 42 *Ga.* 397.

⁶ *McWilliams v. Hopkins*, 4 *Rawle*, 382; *Bradley v. Commonwealth*, 31 *Pa. St.* 522. And in *Picquet*, Appellant, 5 *Pick.* 65, 76, *Parker, C. J.*, intimates that probably the administration would be void where no bond is given.

⁷ *Small v. Commonwealth*, 8 *Pa. St.* 101.

⁸ *Picquet*, Appellant, 5 *Pickering*, 65, 76; *Abercrombie v. Sheldon*, 8 *Allen*, 532, 534.

trator to give bond does not avoid the letters of administration, but only makes them voidable;¹ nor does the cancellation of the bond *per se* revoke the appointment, or disqualify the administrator from bringing suit.² In Louisiana, an executor is required to settle up the estate in one year, and if he does not, to give bond at the end thereof, in default of which he should be dismissed, and an administrator *de bonis non* with the will annexed — there called dative executor — appointed.³

But administration is not usually void for want of bond.

§ 254. **When Additional Bond may be ordered.** — Whenever it becomes apparent that the sureties of an administration bond have become insolvent, or that the penalty in the bond is in too small an amount, or that the bond is from any cause insufficient or inadequate, the executor or administrator should be ruled to give other or further security.⁴ For failure to comply with such an order, the executor or administrator may be removed from office by the judge of probate.⁵ Any person in interest may petition the probate court for an order

Court may order additional bond whenever necessary.

to compel additional or better security, and on [*547] the trial of such *motion it is sufficient, as already indicated, that their interest be alleged under oath.⁶ The service of notice upon the executor or administrator in such proceeding is generally prescribed in the statutes of the several States; in Louisiana it has been held that service upon the attorney at law of the executor, in the absence of the latter from the State, was sufficient.⁷ On the trial of a motion for new bond, on the ground of the insufficiency of the sureties, the sureties may prove their sufficiency by their own oath, and then it will devolve upon the other party to show their insufficiency.⁸ As to the statement of facts necessary to authorize the probate court to order additional security, it is sufficient to refer to the provisions of the statutes upon the subject, which generally indicate the circumstances under which further or other security may be required with sufficient

Any person interested may move for additional bond.

Statutes determine what facts will authorize requirement of new bond.

¹ Harris v. Chipman, 9 Utah, 101; Ryan v. Am. Co., 96 Ga. 322; Sullivan v. Tioga R. R., 44 Hun, 304, 307; Leatherwood v. Sullivan, 81 Ala. 458; *Ex parte* Maxwell, 37 Ala. 362; Jones v. Gordon, 2 Jones Eq. 352; Spencer v. Cahoon, 4 Dev. L. 225; Slagle v. Entrekkin, 44 Oh. St. 637, 640; Arrowsmith v. Gleason, 129 U. S. 86 (a guardian's bond).

² Clarke v. Rice, 15 R. I. 132.

³ Peale v. White, 7 La. An. 449.

⁴ Killcrease v. Killcrease, 7 How. (Miss.) 311; Ellis v. McBride, 27 Miss. 155; Atkinson v. Christian, 3 Gratt. 448.

"A new bond may always be required, if the original bond appear at any time to be inadequate": Wells, J., in Hannum v. Day, 105 Mass. 33, 38. Gary, in his work on Probate Law, bases this authority of probate courts on their inherent powers to prevent a failure of justice: p. 113, n. 20; but it is expressly conferred in most, if not all, of the States by statute.

⁵ National Bank of Troy v. Stanton, 116 Mass. 435.

⁶ *Ante*, § 251.

⁷ Succession of Bobb, 27 La. An. 344.

⁸ Ross v. Mims, 7 Sm. & M. 121.

clearness. Insolvency, death, or removal from the State of the sureties, and inadequacy of the penalty, are the most usual. The insolvency of the principal in the bond, while the sureties remain solvent, is no ground for increasing the amount of the bond.¹ In California the powers of the executor may be suspended until the application for an order to give new bond can be heard.²

§ 255. Nature of the Liability of Sureties; Effect of New Bonds.

—The liability of a surety on an administrator's bond is co-extensive with the liability of the principal in the bond.³ The refusal or neglect of the principal to obey or comply with the judgment or decree of a court of competent jurisdiction constitutes a breach rendering the sureties liable, and they are bound and concluded by such judgment against the principal,⁴ unless, of course, there was collusion or fraud between the principal and those who seek satisfaction out of the sureties, which must be established in a direct proceeding.⁵ But the judgment, to bind the sureties, must self-evidently be one that is enforceable against the principal; unless there be a judgment to be satisfied *de bonis propriis*, the sureties are not liable;⁶ their liability does not arise until the default of their principal has been fixed.⁷ Hence sureties, though not parties to the record, nor beneficially interested in proceedings against executors or administrators, are allowed to appeal from judgments against *their principals;⁸ [*548] and the Statute of Limitations runs from the decree or order fixing the liability, and not from the death of an administrator who dies before the estate is finally settled.⁹ The conclusiveness upon the surety of a judgment against his principal is held to extend to a decree rendered after the death of the administrator, upon an

Sureties are concluded by judgment against their principal,

unless obtained by fraud or collusion.

Only judgments enforceable against the principal bind the sureties,

and they may appeal from judgments against the principal.

Statute of Limitations runs from the judgment fixing the liability.

¹ Sharkey's Estate, 2 Phila. 276.

² Estate of White, 53 Cal. 19.

³ Ward v. Tinkham, 65 Mich. 695, 703.

⁴ Nevitt v. Woodburn, 160 Ill. 203; Deobold v. Oppermann, 111 N. Y. 531, 536; Speer v. Richmond, 3 Mo. App. 572, 573; People v. Stacy, 11 Ill. App. 506; Frank v. People, 147 Ill. 105, 111; Holden v. Curry, 85 Wis. 504, 512; Bellinger v. Thompson, 26 Oreg. 320, 347; Martin v. Tally, 72 Ala. 23, 30; McClellan v. Downey, 63 Cal. 520; Morrison v. Lavell, 81 Va. 519; Slagle v. Entekin, 44 Oh. St. 637. See Woerner on Guardianship, § 45.

⁶ Wolff v. Schaeffer, 4 Mo. App. 367,

375, affirmed in 74 Mo. 154, 158; Scofield v. Churchill, 72 N. Y. 565, 570.

⁶ Wilbur v. Hotto, 25 S. C. 246; Bennett v. Graham, 71 Ga. 211.

⁷ Grady v. Hughes, 80 Mich. 184.

⁸ McCartney v. Garneau, 4 Mo. App. 566, 567; People v. Stacy, 11 Ill. App. 506, 508; Bush's Appeal, 102 Pa. St. 502, 504. In Maine the surety cannot appeal, except in the principal's name, see § 544, p. *1194, note.

⁹ Williams v. Flippin, 68 Miss. 680; George v. Elms, 46 Ark. 260. Delay on the part of the beneficiaries in calling the executor to account does not discharge his sureties: Biggins v. Raisch, 107 Cal. 210.

account submitted by the administrator's personal representative;¹ but this doctrine is repudiated elsewhere, on the theory that as there is no technical privity between an administrator in chief and a succeeding administrator *de bonis non*, acts or admissions by, nor judgments against, the former are not admissible against the latter, although the administrator *de bonis non* is concluded by rightful acts of administration of his predecessor,² and that hence the judgment ascertaining the indebtedness of the administrator in chief to the estate at the time of his death, in an accounting by his personal representative to which the surety was no party, is, as to the surety, *res inter alios acta*.³ The general rule appears to hold judgments against principals in bonds, who have not had their day in court, competent, but not conclusive evidence against their sureties,⁴ although it has also been held, that such judgment is not evidence at all against the surety;⁵ but administration bonds are held to form an exception to this general rule, and sureties on such, in respect of their liability for the default of their principal, to be classed with those sureties, who covenant that their principal shall do a particular act.⁶ The sureties are the privies of the administrator and precluded from questioning any lawful order made by the court having jurisdiction over the principal.⁷

Conclusiveness of judgment rendered after administrator's death.

It is obvious that the purpose of a new or additional bond ordered by the court *ex mero motu*, or moved by some interested person for the better protection of the estate, or voluntarily given by the principal in anticipation of such an order, is to add the security resulting from the new to that afforded by the old bond. Hence the estate is protected, after the giving of the new bond, by both sets of sureties; those on the first bond remaining, and those on the second bond becoming, liable for any breach happening after the new bond is given.⁸ Where the condition of

Additional bond is cumulative, if required by the court *ex mero motu*, or on motion of some one interested in the estate as beneficiary.

¹ Williams v. Flippin, 68 Miss. 680, 688; Judge v. Quimby, 89 Me. 574.

² Martin v. Ellerbe, 70 Ala. 326.

³ Ib. 334.

⁴ Munford v. Overseers, 2 Rand. 313, 315 (suit on a sheriff's bond); Craddock v. Turner, 6 Leigh, 116, 122; Lyles v. Caldwell, 3 McC. 225; Ordinary v. Condy, 2 Hill (S. C.), 313; Bryant v. Owen, 1 Ga. 355, 369 (on a guardian's bond); Weir v. Monahan, 67 Miss. 434, 455.

⁵ McKellar v. Bowell, 4 Hawks, 34 (on a guardian's bond).

⁶ Irwin v. Backus, 25 Cal. 214, 223, quoting from Lyles v. Caldwell, 3 McCord,

225, and quoted as authority in Nevitt v. Woodburn, 160 Ill. 203, 209.

⁷ Gerrould v. Wilson, 81 N. Y. 573, 583; Scofield v. Churchill, 72 N. Y. 565, 570.

⁸ "The plain intent of these acts was, that the security should be accumulative, and not an entire substitution of the one bond for the other": *Per* Holmes, J., in State v. Drury, 36 Mo. 281, 286; see Wood v. Williams, 61 Mo. 63; State v. Fields, 53 Mo. 474, 477; Haskell v. Farrar, 56 Mo. 497. So where, upon application of one who erroneously supposed himself to be a surety, an ineffectual decree was made discharging him, and another bond was

the bond is that the principal shall "account for, pay, and deliver all money and property of said estate," the sureties on the last bond are liable for the loss following any defalcation, conversion, or *devastavit* committed by the principal, whether before or after the giving of the last bond, because the non-payment after an order by the court having jurisdiction constitutes a distinct breach of the bond;¹ the same result follows where the terms of the bond are to "do and perform all other acts which may be required of him at any time by law."² In such case both sets of sureties are liable: the first, because the conversion or other misconduct leading to the loss of the assets occurred during the time when they were sureties; the last, because the non-payment constituted a breach while *they* * were [* 549] such.³ But the sureties themselves are entitled to relief in case of the insolvency of either principal or co-surety on the bond,

And original and additional bondsmen are both liable.

Original sureties are exonerated if new bond is given on their motion.

or when any of the co-sureties have died or left the State, or when the principal is wasting or mismanaging the estate. Provision is made by statute in many States enabling sureties to protect themselves against future liability on their bonds by moving for an order against their principal to give counter security, or a new bond, and in default thereof to revoke his authority.⁴ So where one of several sureties is released, his co-sureties are not liable for subsequent breaches, if a new bond is given.⁵ In Missouri the statute distinctly points out the effect of a new or additional bond: if given in response to the complaint of a person bound as security in the bond, the sureties on the first bond are discharged from any misconduct of the principal after the new bond is accepted and filed;

given, it was held that both bonds were valid; and that each set of sureties was responsible, *inter sese*, in proportion to the amount of the bonds and the liability incurred: *Brooks v. Whitmore*, 142 Mass. 399. The law is the same, *mutatis mutandis*, as that governing liability of sureties on successive guardians' bonds; for a discussion of which see Woerner on Guardianship, § 43, pp. 142 *et seq.*

¹ *Wolff v. Schaeffer*, 74 Mo. 154, 158, affirming s. c. 4 Mo. App. 367, 375. The sureties on an administration bond are liable for assets misapplied before the execution of the bond: *Bellinger v. Thompson*, 25 Oreg. 320, 341, and cases cited. But the mere proof that assets came into the administrator's hands does not make out a *prima facie* liability as for *devastavit*: *State v. Huther*, 4 Mo. App. 575.

² *Pinkstaff v. People*, 59 Ill. 148, 150. To same effect: *Scofield v. Churchill*, 72 N. Y. 565; *Lacoste v. Splivalo*, 64 Cal. 35; *Foster v. Wise*, 46 Oh. St. 20, and authorities cited.

³ *State v. Berning*, 74 Mo. 87, 97, affirming 6 Mo. App. 105; *Lewis v. Gambs*, 6 Mo. App. 138, 141.

⁴ *Brooks v. Whitmore*, 139 Mass. 356.

⁵ *State v. Barrett*, 121 Ind. 92. It was held in *Veach v. Rice*, 131 U. S. 293, that where the court allowed the resignation of one of two administrators in due form, and the remaining administrator thereupon gives a new bond, the sureties on the joint bond of both are exonerated for *devastavit* thereafter committed. See on this subject Woerner on Guardianship, § 43.

if given in compliance with an order of court made "whenever it shall appear necessary and proper,"¹ the new bond is simply cumulative, and the old sureties remain liable. In some States a surety on an administration bond is entitled to be relieved from future liability under it on his own motion, by simply alleging that he conceives himself to be endangered by his suretyship without making any proof whatever;² while in others proof is required of one or more of the facts named in the statute as authorizing such surety's release.³ The probate court cannot, however, relieve a surety from liability, save in pursuance of some statutory provision,⁴ which must be strictly complied with.⁵

Surety may be relieved from liability for subsequent default by his own motion.

Before any such order can be made, there must be notice or citation to, or an appearance by, the administrator;⁶ but he cannot be cited for the purpose of accounting and taking bond for the balance that may be found in his hands.⁷ The proper relief is an order directing the executor or administrator to give a new bond with additional sureties, or to revoke, in default thereof, the letters granted, and appoint an administrator *de bonis non*.⁸ An order to pay the money found [* 550] * to be due from the administrator into court, is self-evidently void, as well as a commitment for contempt of court in refusing to obey such order.⁹ But if the surety himself be appointed administrator *de bonis non*, his liability on the bond constitutes a debt which becomes assets in his hands, although the amount has not been fixed by any account or judgment rendered, and for which his sureties are liable.¹⁰

Notice must be given to the administrator.

If upon revocation of the letters of an administrator for want of a new bond ordered on the motion of his surety, letters *de bonis non* be granted to the same person, the former sureties are thereby fully discharged, because the administrator and his successor are the same

¹ Wood v. Williams, 61 Mo. 63; State v. Wolff, 10 Mo. App. 95, 98 (holding the provision discharging former sureties inapplicable to the public administrator).

² De Lane's Case, 2 Brev. 167 (Bay, J., dissenting), affirmed in McKay v. Donald, 8 Rich. L. 331; Lewis v. Watson, 3 Redf. 43; Johnson v. Fuquay, 1 Dana, 514; Harrison v. Turbeville, 2 Humph. 242, 245; Jones v. Ritter, 56 Ala. 270, 280; People v. Curry, 59 Ill. 35; Allen v. Sanders, 34 N. J. Eq. 203.

³ Valcourt v. Sessions, 30 Ark. 515; Sanders v. Edwards, 29 La. An. 696; see Missouri cases, *supra*, p. * 548; Succession of Boutté, 32 La. An. 556; Sifford v. Morrison, 63 Md. 14.

⁴ Such release is void: Bellinger v.

Thompson, 26 Oreg. 320, 345, and authorities cited.

⁵ Clark v. Amer. Sur. Co., 171 Ill. 235.

⁶ Gilliam v. McJunkin, 2 S. C. 442, 449. Notice to the heirs is not generally required: Clark v. Amer. Sur. Co., 171 Ill. 235.

⁷ Waterman v. Bigham, 2 Hill (S. C.), 512.

⁸ Owens v. Walker, 2 Strobb. Eq. 289; Waterman v. Bigham, *supra*; Gilliam v. McJunkin, *supra*; Morgan v. Dodge, 44 N. H. 255, with a collection of numerous authorities.

⁹ Gilliam v. McJunkin, *supra*.

¹⁰ This and similar points are more fully discussed *post*, § 311. See cases cited p. * 653, note.

Original sureties discharged if the former administrator be appointed *de bonis non*.

How liable if there is no revocation of authority, but a new bond.

person, so that there can be no accounting between the old and the new administration, and it must be presumed that the administrator *de bonis non* has received from himself all the assets belonging to the estate.¹ But where a new bond is given, and there is no revocation of authority, the liability continues in the old as well as in the new sureties, and in such case, as between themselves, the new sureties are primarily, the old collaterally liable. If the first sureties are made to pay, they are entitled to be reimbursed in full from the second sureties; but if these pay, they are not entitled to recover from the former. And hence, if the former sureties are released, the latter are not thereby affected; but if the latter are released, this will discharge the former also.² In Tennessee it is held that in such case the second set of sureties are primarily liable to the * extent of their bond, and, if they prove [* 551] insufficient, the first sureties are liable for any conversion before their release; the second sureties account first for any default after their suretyship, then for any that may have been committed before.³ In Illinois the sureties may, if the executor or administrator, on their motion, give a new bond relating back to the time of the original grant of letters, be discharged from all liability for past as well as future acts; but unless the new bond be given in such form, the release can only be as to future default.⁴ In the absence of statutory provisions on the subject, the surety discharged from further liability is clearly liable for all breaches of the bond during the time he was surety.⁵ And in Ohio, if a new bond is given, not on petition of a surety, but for the protection of the estate, as between these two sets of sureties for breaches before the second bond was given, the old sureties are primarily liable, and if the new sure-

¹ *Enicks v. Powell*, 2 Strobb. Eq. 196, 206; *Whitworth v. Oliver*, 39 Ala. 286; *Steele v. Graves*, 68 Ala. 17, 21; *Lingle v. Cook*, 32 Gratt. 262. It was held in Alabama, that where an administrator resigned, and was again appointed, with new sureties, the beneficiaries may hold either set of sureties for a balance decreed against him for the first administration; but where, both administrations being settled on the same day, the balance ascertained on the settlement of the first administration is carried, at the instance of the distributees, as a debt into the second, the sureties on the first bond are thereby released: *Modawell v. Hudson*, 80 Ala. 265.

² *Field v. Pelot*, 1 McMullen Eq. 369, 377. But see dissenting opinions of Chan-

cellors Dunkin and Johnson, both holding that in such case the sureties on the first bond were discharged: p. 389 *et seq.* To the same effect, *Trimmier v. Trail*, 2 Bai. L. 480, 486; *Joyner v. Cooper*, 2 Bai. L. 199; *People v. Curry*, 59 Ill. 35; *People v. Lott*, 27 Ill. 215. The second bond becomes the primary security, even to such of the sureties on the first bond as did not petition; but where, by an error, the balance is shown to be much smaller than the true balance on the application for new security, the first bond is primarily liable to the extent of such error: *Bobo v. Vaiden*, 20 S. C. 271.

³ *Morris v. Morris*, 9 Heisk. 814.

⁴ North, Prob. Pr. §§ 262, 263; *People v. Lott*, *supra*; *People v. Curry*, *supra*.

⁵ *McKim v. Blake*, 132 Mass. 343.

ties are compelled to pay they may recover the whole amount from the former.¹ In Virginia and West Virginia the statute provides that a new bond, without any express provision therein to that effect, shall bind the obligors therein to indemnify the sureties in the former bond against all loss or damage in consequence of executing the former bond.²

It is sometimes of importance to ascertain in what capacity a principal, who has given bond as executor or administrator, and also as guardian, trustee, or other fiduciary, with different sureties, is chargeable with assets. In such case it is to be remembered that, where the obligation to pay and the right to receive are united in the same person, the law operates the appropriation of the fund to the discharge of the debt.³ Hence, where an administrator who is also guardian of a minor distributee, has made final settlement, and there is an order directing the payment of the distributive shares, such order will operate to charge him in his capacity as guardian, and relieve his sureties on the administration bond;⁴ but until such final settlement is made, or the assets accounted for, the former sureties remain liable;⁵ and where the share due the minors is not ascertained until after their majority, the debt becomes payable to them and not their former guardian, and the sureties on the administration bond are not discharged.⁶ So where a surviving partner is executor of the deceased partner, his sureties on the executor's bond do not become liable for his acts as surviving partner until the partnership affairs are wound up and the interest of the estate therein ascertained.⁷ But where an administrator has no further use for assets as such, and is also guardian of a distributee, he will be treated as holding them as guardian, even if he has not made final settlement.⁸

But the efficacy of bonds cannot be permitted to be endangered or destroyed by applying this doctrine to the transfer of the mere indebtedness of a fiduciary from himself in one, to himself in another capacity, so as to exonerate his sureties in the former capacity, and either throw the burden on another set of sureties, or entail the loss on the beneficiaries, without some overt act manifesting the transfer of actually existing assets.⁹ It has been held in Maryland that the

¹ *Corrigan v. Foster*, 51 Oh. St. 225.

² *Lingle v. Cook*, 32 Gratt. 262, 274; *Hooper v. Hooper*, 29 W. Va. 276, 299.

³ *Ruffin v. Harrison*, 81 N. C. 208, 212, citing earlier cases; *State v. Cheston*, 61 Md. 352, 373, and numerous cases.

⁴ *Ruffin v. Harrison*, *supra*, affirmed in s. c. 86 N. C. 190; *Bell v. People*, 94 Ill. 230; *Seegar v. Betton*, 6 Har. & J. 162; *Coleman v. Smith*, 14 S. C. 511, 514; *Chick v. Farr*, 31 S. C. 463, 476; *Woolley v. Price*, 86 Md. 176, reviewing earlier Maryland cases.

⁵ *Ruffin v. Harrison*, 81 N. C. 208, 217; *Cluff v. Day*, 124 N. Y. 195; *Bellinger v. Thompson*, 26 Oreg. 320, 339.

⁶ *Burnside v. Robertson*, 28 S. C. 583, 588.

⁷ *Hooper v. Hooper*, 32 W. Va. 526.

⁸ *United States v. May*, 4 Mack. 4, citing numerous Maryland cases; *Fielder v. Rose*, 61 Mo. App. 189.

⁹ *State v. Branch*, 112 Mo. 661, 669; *Gilmer v. Baker*, 42 W. Va. 72, 92; *Probate Court v. Angell*, 14 R. I. 495; *Potter v. Ogden*, 136 N. Y. 384, 397, 402; *Conkey*

mere technical *devastavit* committed by failing to keep the funds of the estate marked and separate from the fiduciary's own is not sufficient to show that the assets have been actually wasted, so as to charge the sureties on his bond; in such case, unless it be further shown that the fiduciary was insolvent, or embarrassed, or not able to meet promptly every demand that could lawfully be made upon him, the presumption of transfer by operation of law applies, and the first sureties are not liable.¹ On the other hand it is decided in Missouri that the solvency of a curator, at the time of taking from himself a receipt as trustee, showing the transfer to him as trustee of the ward's estate, does not relieve his sureties on the curator's bond.²

* § 256. **Technical Execution of the Bond.** — The form in [* 552] which bonds are to be taken from executors and administrators is generally prescribed by statute, and errors may be avoided by the exercise of ordinary care and attention on the part of the

probate judge or clerk. In some instances, these bonds have been construed with technical strictness against the obligees, and held void as statutory bonds where they deviated from the statutory form;³ but the general

v. Dickinson, 13 Metc. (Mass.) 51. See this subject treated in connection with the liability of sureties on guardian's bonds, in Woerner on Guardianship, §§ 98, 102.

¹ *State v. Cheston*, 51 Md. 352, 382.

² *State v. Branch*, 126 Mo. 448; and see s. c. 134 Mo. 592, criticising *Tittman v. Green*, 108 Mo. 22.

³ As in the cases of *McWilliams v. Hopkins*, 4 Rawle, 382; *Bradley v. Commonwealth*, 31 Pa. St. 522; *Picquet*, Appellant, 5 Pick. 65, and *Small v. Commonwealth*, 8 Pa. St. 101, cited under § 253, *ante*; also *Arnold v. Babbit*, 5 J.J. Marsh. 665; *Cowling v. Nansemond Justices*, 6 Rand. 349, holding that the omission of the names of the obligees, of the executor, and of the court made the bond fatally defective; *Roberts v. Colvin*, 3 Gratt. 358, deciding that no action can be brought on an administrator's bond containing no provision for the benefit of creditors; *Frazier v. Frazier*, 2 Leigh, 642, and *Walker v. Crosland*, 3 Rich. Eq. 23, holding the bond of an administrator with the will annexed in the form of an ordinary administrator's bond, containing no reference to the will, bad as a statutory bond; to same effect, *Frye v. Crockett*, 77 Me. 157; also *Morrow v. Peyton*, 8 Leigh, 54. In some of these cases it is intimated that

the bonds were nevertheless good common-law bonds. But in Ohio bonds are construed with the utmost rigor against the obligees; *Ranney, J.*, in *McGovney v. State*, 20 Ohio, 93, which was a suit on an executor's bond, adopts and indorses the language of the majority of the court in *State v. Medary*, 17 Ohio, 554, 565: "The bond speaks for itself, and the law is that it shall so speak, and that the liability of sureties is limited to the *exact* letter of the bond. Sureties stand upon the words of the bond, and if the words will not make them liable, nothing can. There is no construction, no equity against sureties. If the bond cannot have effect according to its exact words, the law does not authorize the court to give it effect in some other way, in order that it may prevail." It was accordingly held that parol evidence was inadmissible to show that the name of the testator was inserted in the bond as James L. Findley instead of Joseph L. Findley by a mistake of the clerk, and that on account of the variance there could be no recovery under the bond. The decision in the case of *State v. Medary*, referred to above, was rendered against the dissent of Hitchcock, J., who contended for a more liberal construction, and cited *Gardener v. Woodyear*, 1 Ohio,

rule is to construe them rigorously against the obligors, and with the utmost liberality in favor of the parties to be protected by them.¹ Bonds have been held good and sufficient although not signed by the administrator² (but this must not be understood as applying to an ordinary administration bond, which is void even as to the sureties

General rule to construe them strictly against obligors.

when not signed by the principal³), and although the names [* 553] of the sureties did not appear in *the body of the bond,⁴

when no amount of penalty is mentioned;⁵ or the name of the decedent is omitted,⁶ or misrecited;⁷ and a blank left in a bond at the time of signing may afterward, before approval or acceptance, be filled in.⁸ So a bond complete on its face and otherwise valid, will bind the sureties in favor of innocent obligees, though the sureties signed it on the strength of an understanding that the bond should not be delivered until signed by certain other persons as co-sureties, who in fact did not do so.⁹ And an executor's, guardian's, or administrator's bond will be obligatory and effective, although its conditions are not strictly in accordance with the requirements of the statute, but provide, in different and more general terms, for the faithful execution of the trust.¹⁰ Thus, a bond conditioned that the

170, *State v. Findley*, 10 Ohio, 51, and *Reynolds v. Rogers*, 5 Ohio, 169, 176, in support of his position and as inconsistent with that of the majority opinion.

¹ *Rose v. Winn*, 51 Tex. 545; *Ordinary v. Cooley*, 30 N. J. L. 179; *Gerould v. Wilson*, 81 N. Y. 573, 577.

² Where a new surety was required, a bond reciting the former bond and executed by the single new surety was held to be in proper form: *Patullo's Case*, Tuck, 140. The bond may be signed before the appointment is made: *Morris v. Chicago, R. I. & P. R. R.*, 65 Iowa, 727.

³ *Wood v. Washburn*, 2 Pick. 24; *Weir v. Mead*, 101 Cal. 125, citing authorities *pro* and *con*.

⁴ If the sureties signed, sealed, and delivered it, they are bound: *Joyner v. Cooper*, 2 Bai. L. 199, resting on the authority of *Stone v. Wilson*, 4 McCord, 203. See also *Woerner on Guardianship*, § 40, citing cases so holding on guardians' bonds.

⁵ In such case the bond will be construed with reference to the law in pursuance to which it is given, and the sureties are liable for the amount for which the law directs such bonds to be given. And it is immaterial that at the time of the

execution of the bond no inventory had been filed: *Soldini v. Hyams*, 15 La. An. 551, and authorities cited in *Mason v. Fuller*, 12 La. An. 68; *Shalter's App.*, 43 Pa. St. 83, 87. See *Woerner on Guardianship*, § 40, for numerous cases of guardians' bonds held valid, though irregular and informal.

⁶ Since the grant of letters and the execution of the bond are parts of one and the same transaction, the letters may be referred to, to explain the ambiguity of the bond in which the name of the decedent is left out: *State v. Price*, 15 Mo. 375.

⁷ *White v. Spillers*, 85 Ga. 555.

⁸ *Rev. St. Ohio*, 1880, § 6. But in an official bond the penalty cannot be inserted by a third person, in the absence of the obligor, without express authority under his hand and seal: *State v. Boring*, 15 Ohio, 507, approved in *Famulener v. Anderson*, 15 Oh. St. 473. See *Woerner on Guardianship*, § 40.

⁹ This seems to be the sounder rule, though cases may be found holding the sureties under such circumstances not liable: see *Belden v. Hurlbut*, 94 Wis. 562, citing a number of cases *pro* and *con*.

¹⁰ *Probate Court v. Strong*, 27 Vt. 202; *Lanier v. Irvine*, 21 Minn. 447; *Judge of*

executor shall administer according to the *will* was held valid;¹ so a bond of an administrator *de bonis non* expressed to be "with the will annexed," although otherwise in the form of an ordinary administration bond;² and where a residuary legatee gave the bond as executor, containing conditions not required of a residuary legatee and omitting an important condition required by law, it was held that this was a good common-law bond, and sufficient to support the grant of letters.³ It is also held that a bond payable * "to the Governor," instead of, as the statute required, "to [* 554] the State," is not for that reason void.⁴ A bond may be voidable at the option of the obligees, but binding on the obligors;⁵ and one defective by reason of the mistake or ignorance of the clerk will be aided in equity as against the sureties.⁶ So it is said that the conjunction "or" should be construed as "and," if necessary to

Probate *v.* Claggett, 36 N. H. 381; Pettin-gill *v.* Pettingill, 60 Me. 411; Casoni *v.* Jerome, 58 N. Y. 315; Ordinary *v.* Cooley, 30 N. J. L. 179, and authorities; Holbrook *v.* Bentley, 32 Conn. 502; Peebles *v.* Watts, 9 Dana, 102; Newton *v.* Cox, 76 Mo. 352; McFadden *v.* Hewett, 78 Me. 24, 28.

¹ Where the statute prescribes that executors shall give bond "in the same manner administrators are by law obliged to be bound," it is not necessary that the executor's bond should be in the precise form of an administrator's bond; and the condition in the administrator's bond to "administer according to law" is properly stated in an executor's bond to "administer according to the *will*," the law requiring the executor to administer according to the will: Hall *v.* Cushing, 9 Pick. 395.

² Hartzell *v.* Commonwealth, 42 Pa. St. 453.

³ Cleaves *v.* Dockray, 67 Me. 118, containing a list of authorities in support of the doctrine, that a bond may be good at common law although not in conformity with the statute: Ware *v.* Jackson, 24 Me. 166; Lord *v.* Lancey, 21 Me. 468; Clap *v.* Cofran, 7 Mass. 98; Sweetser *v.* Hay, 2 Gray, 49; Stephens *v.* Crawford, 3 Ga. 499; Williams *v.* Shelby, 2 Oreg. 144; in such case, however, the bond cannot be sued in the name of a successor to the judge to whom it is given: Frye *v.* Crockett, 77 Me. 157; the writ in a suit on such a bond may be amended by inserting the name of a person as prose-

cutor: Waterman *v.* Dockray, 79 Me. 149. And also in support of the proposition, that a bond is not in all cases void as a statutory bond merely because it does not in all respects conform to the statute: Van Deusen *v.* Hayward, 17 Wend. 67; Morse *v.* Hodsdon, 5 Mass. 314; Proprietors of Union Wharf *v.* Mussey, 48 Me. 307; Commissioners *v.* Way, 3 Ohio, 103; Postmaster General *v.* Early, 12 Wheat. 136; Commonwealth *v.* Laub, 1 Watts & S. 261; Baldwin *v.* Standish, 7 Cush. 207. To which may be added United States *v.* Hodson, 10 Wall. 395, with the authorities there cited. See also McChord *v.* Fisher, 13 B. Monroe, 193, in which it is held that, although letters granted in a county which was not the intestate's domicile at the time of his death, and in which he had no personal property, were void, yet the bond given by an administrator so appointed was a good bond at common law. So it is elsewhere held, that a bond voluntarily given is a good common-law bond though the court had no power to require it: see authorities cited in Bellinger *v.* Thompson, 26 Oreg. 320, 337; and Woerner on Guardianship, § 40.

⁴ Sikes *v.* Truitt, 4 Jones Eq. 361. To the same effect, Johnson *v.* Fuquay, 1 Dana, 514; Wiser *v.* Blachly, 1 John. Ch. 607; Farley *v.* McConnell, 7 Lans. 428, 430.

⁵ Cohea *v.* State, 34 Miss. 179.

⁶ Armistead *v.* Bozman, 1 Ired. Eq. 117; Sikes *v.* Truitt, *supra*.

give validity to the bond;¹ and that a strict and technical conformity to the statute is not essential to the validity of the bond, if it substantially conform thereto, and does not vary in any matter to the prejudice of the rights of the party to whom or for whose benefit it is given.² Where a bond contains more than the statute prescribes, the stipulations not required by the statute may be rejected as surplusage, and the bond still be regarded as a statutory bond, and sued on as such.³ Although the statute require two sureties, the bond is valid if signed by only one.⁴ But the alteration of an administration bond executed by the principal and two sureties, by increasing the amount of the penalty with the consent of the principal, but without the knowledge of the sureties, discharges the latter; and the execution of such bond by two additional sureties who did not know of the alteration is void.⁵

[* 555] *§ 257. **Amount of the Penalty.**—The amount in which security is to be given is necessarily left to the discretion of the probate court, the statutes generally fixing a minimum only, below which the amount must not be ordered. In Louisiana the amount of the bond is fixed by the law at one fourth beyond the estimated value of the movables and immovables, and of the credits comprised in the inventory exclusive of bad debts;⁶ and in Mississippi in a penalty at least equal in value to such estate as the law determines shall be under his charge;⁷ in the other States, at double the value of the personal property of any kind,⁸ including the proceeds of sale of real estate, where the power to sell is given by will, which may come into the hands of the executor or administrator by virtue of his office.⁹ The clerk and court taking

Amount of bond in the discretion of the court, above the minimum prescribed by statute.

¹ *Outlaw v. Farmer*, 71 N. C. 31.

² *Farley v. McConnell*, *supra*; *Casoni v. Jerome*, 58 N. Y. 315.

³ *Woods v. State*, 10 Mo. 698, citing *Grant v. Brotherton*, 7 Mo. 458, as announcing the doctrine that a bond given under a statute is valid, although not in the words of the statute, unless the statute prescribe a form, and declare bonds not in accordance therewith void.

⁴ *Steele v. Tutwiler*, 68 Ala. 107.

⁵ The first two sureties were discharged by the alteration of the bond without their consent; the last two, because their signing was upon the understanding that they were bound only with the first two; *Howe v. Peabody*, 2 Gray, 556.

⁶ Civ. Code, art. 1041; *Voorhies*, Rev. St. § 1477; *Feray's Succession*, 31 La. An. 727.

⁷ *Ellis v. Witty*, 63 Miss. 117; Code, 1880, § 1995.

⁸ See as to rule in California: *Kidd's Estate*, Myr. 239. New York: *Sutton v. Weeks*, 5 Redf. 353. In case of ancillary letters: *Matter of Prout*, 128 N. Y. 70. By "value" is meant the value as estimated by the court: *Williams v. Verne*, 68 Tex. 414, 418.

⁹ In the construction of wills, as in equity, land directed to be sold and converted into money is treated as money: *Craig v. Leslie*, 3 Wheat. 563, 577; *Allison v. Wilson*, 13 Serg. & R. 330; *Gray v. Smith*, 3 Watts, 289. *Rogers, J.*, in *Commonwealth v. Forney*, says: "As an executor is appointed on a special trust and confidence reposed in him by the testator, he is not required, in the first instance, to give security for the faithful execution of the trust. But as the confidence of the

Duties of the court in taking the bond. the bond are required to satisfy themselves of the solvency of the sureties offered, and for this purpose may examine the sureties themselves, the principals, or any other person, under oath; and the bond should not be accepted unless signed by a sufficient number of sureties who appear to be perfectly solvent, owning property in excess of their debts and liabilities, and of what may be exempt from execution under the law;¹ and the aggregate amount of the property so owned by the

* several sureties should equal at least the penalty of the [* 556] bond.² It is generally required that the sureties be inhabitants of the State;³ and certain classes of persons are in some States forbidden from being received as sureties on administration bonds.⁴ But such provisions are considered directory merely, and not designed to invalidate the bond where the law is disregarded.⁵ Under the English Probate Act,⁶ the court or registrar taking bond is

testator may be abused, on complaint that the executor is likely to prove insolvent, &c., the Orphan's Court may compel him to give security, &c. in such sums, and with such sureties, as they may think reasonable. When such a step is taken, it is the duty of the court to have regard to the will, and especially to the value of the estate, whether real or personal; and when the will contains a power to sell real estate for payment of debts or for other purposes, to exact bail sufficiently large to cover the amount arising from the sale of the real as well as the personal property. So on the death of the executor, or when, being unwilling or unable to comply with the order of the court, he is dismissed, the same course may and ought to be pursued as regards the administrator *cum testamento annexo*." 3 W. & S. 353, 355, *et seq.* So where the executor has power to charge the whole estate, the bond should be determined by the value of the whole estate, real and personal: *Ellis v. Witty*, 63 Miss. 117.

¹ But the judge cannot arbitrarily reject a bond as to the sufficiency of which no reasonable doubt exists: *Carpenter v. Probate Judge*, 48 Mich. 318. Sureties on the bond who are legatees, with no property except as derived from the will, are not sufficient: *Ellis v. Witty*, 63 Miss. 117, 120.

² But the acceptance of an insolvent surety will not affect the validity of the appointment or the acts of the administrator: *Herriman v. Janney*, 31 La. An. 276,

280; nor the fact that the bond is insufficient: *Mumford v. Hall*, 25 Minn. 347, 353.

³ See the statutory provisions on this subject in the several States. But the non-residence of the sureties, or of a sole surety, is not a sufficient cause to vitiate the sale of lands for the payment of debts, after consummation and confirmation: *Johnson v. Clark*, 18 Kans. 157, 167; and in Massachusetts, where a bond was signed by two inhabitants of the State and one who was described as an inhabitant of another State, it was held sufficient, if approved and accepted by the probate court, to qualify the administrator to act: *Clarke v. Chapin*, 7 Allen, 425 *et seq.* Nor is their non-residence in the county where application is made a sufficient reason for refusing administration: *Barksdale v. Cobb*, 16 Ga. 13. And in South Carolina sureties are not required to be resident in the State: *Jones v. Jones*, 12 Rich. L. 623. Nor in Kentucky: *Rutherford v. Clarke*, 4 Bush, 27.

⁴ So in Missouri no judge of probate, sheriff, marshal, clerk of court, or deputy of either, and no attorney at law, shall be taken as security in any bond required in the probate court: Rev. St. 1889, § 20. The reason for excluding the officers mentioned is patent enough; attorneys at law, however, seem to be discriminated against rather as a protection to them from the annoyance of their clients than from motives of public policy.

⁵ *Hicks v. Chouteau*, 12 Mo. 341.

⁶ 20 & 21 Vict. c. 77, § 82.

authorized to take more bonds than one, "so as to limit the liability of any surety to such amount as the court or district registrar shall think reasonable." This seems a wise and highly beneficial measure, commending itself to the favorable consideration of the legislative authorities, but seems not, thus far, to have received any attention or favor in America.¹

¹ In *Baldwin v. Standish*, 7 Cush. 207, and *People v. Lott*, 27 Ill. 215, the appellate courts criticise the approval, by the probate court, of several smaller bonds in lieu of one bond of the required amount, but held the bonds given to be valid. It is not clear why, if they were valid statutory bonds, the practice of taking such should be discouraged. It may be unwise, of course, to permit courts of special jurisdiction, created by statute, to transcend the limits of their statutory powers; and in this view the substitution of several smaller bonds for the one bond required by the statute, is against the policy of the law. But probate tribunals are more keenly aware, probably, than appellate courts, of the hardships connected with the giving of bonds by executors, administrators, and guardians; and how much more rational it would be to permit the taking of bonds in which the surety is allowed to limit his liability to an amount which he might feel able to lose without ruin to himself and his family, — provided such bonds aggregate the amount deemed sufficient to protect the estate under administration, — rather than to insist on single bonds, exceeding in amount, in many cases, the total estate of each single surety, and thus compel them to assume the risk of being reduced from affluence to poverty. The statute alluded to in the text is designed to afford the relief by legislation which the probate judges in the cases mentioned above undertook to accomplish without legislative sanction, — that of allowing the principal to give two, three, or even more bonds, in limited amounts, aggregating, however, the total penalty required, who might find it impossible to obtain, or against his conscience to ask, sureties to stand each for the whole amount.

Other English statutes have been enacted, the principle of which might with profit be extended to the American law touching administration bonds. Thus, by

the act of 6 & 7 Wm. IV. c. 28, it was provided that deposits of stock or exchequer bills might be made in lieu of giving security by personal bonds. Why could not collateral security be received in America, — government, State, or other safe bonds, notes secured, or even money, to be deposited in the county treasury and held as long as necessary to protect the estate under administration? or even the administrator's or guardian's recognition, to operate as a lien on his real estate, if sufficient, until discharged by order of the court? This would constitute unexceptional security, if regulated by proper legislation, and would secure the services of the most efficient and trustworthy persons, who under the existing law, refuse to serve in any fiduciary capacity, because they deem it both unwise and unjust to their friends to ask them to become personally liable on a bond.

The statute of 1 & 2 Vict. c. 61, providing for the acceptance of the guaranty of the Guaranty Society, in lieu of bonds with personal sureties, from any person required by virtue of his office to give bond, was followed by a number of similar enactments in England and Canada, and within a few years past Surety Insurance Companies have been incorporated in many of the States, enabling executors, administrators, curators, guardians, &c. to assume their trusts upon giving the bond or guaranty of a company organized and chartered to this end. The rapid increase of the number of these corporations, the readiness with which the State legislatures give them legal existence (they are recognized by law in California, Connecticut, Florida, Georgia, Illinois, Indiana, Maine, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Wisconsin, and perhaps other States), and the favor which they enjoy at the hands of the public, are sufficient evidence that they meet a

*** § 258. Joint or Separate Bonds.** — When there are sev- [* 557]
 eral executors or administrators, they may, in some of the
 States, * either give one joint bond, or each a separate bond.¹ [* 558]

Joint executors
 may give a
 joint, or each a
 separate bond.

If separate,
 each must be
 in the full
 amount of the
 penalty.

In a joint bond
 both principals
 are liable to the
 obligees for all
 assets coming
 to their joint
 possession.

Where separate bonds are given, each must be
 in a penalty as high as that required for a joint bond,
 because each executor or administrator is lawfully en-
 titled to take into possession and administer any or all
 of the assets, and the court cannot control them in this
 right.² But if a joint bond be given, even though ex-
 empt in the will from giving bond, its effect is to make
 them both liable to the obligees, as trustees for credi-
 tors and others having an interest in the estate, to the
 extent of the assets which come into their joint posses-
 sion.³ At common law, under which executors were not
 required to give bond, an executor was not liable for
 the malfeasance of a co-executor, unless it could be

shown that he had concurred therein, or that there had been joint
 possession of the estate, from which it would be inferred that one
 executor had yielded to the control of the other, who squandered it.⁴

Not as
 executors,

The same rule is adhered to in America as to co-admin-
 istrators and co-executors; the executor or administra-

deeply felt want and offer a remedy for
 a grievous evil. Giving bond for faithful
 and proper administration of estates held
 in trust is by them reduced to a business
 question, and no longer involves the haz-
 ard of ruin to confiding and generous
 friends and their families; honest, capa-
 ble business men are enabled to assume
 the management of trust estates without
 placing themselves under galling obliga-
 tions to bondsmen, the contemplation of
 which has hitherto deterred the very best
 class of men from becoming trustees.

But the greatest benefit arising out of
 the operation of Surety Insurance Com-
 panies lies in the fact — not that they
 offer the most certain indemnity to those
 whose interests have suffered in conse-
 quence of lack of integrity or skill on the
 part of trustees, which they unquestion-
 ably do (see remarks of the President of
 the High Court of Justice in *Carpenter v.*
Solicitor, L. R. 7 P. D. 235), — but that
 they tend very greatly to prevent the
 occurrence of defalcations and maladmin-
 istrations. It is their interest, and they
 provide themselves with the means, to
 keep under surveillance and control the
 conduct of the executor or guardian for
 whom they stand as surety, to an extent

beyond the power of courts, personal
 sureties, or parties in interest. No class
 of persons will hail with profounder grati-
 fication the success of these corporations
 than courts of testamentary jurisdiction,
 as furnishing them with the most effi-
 cient assistance in protecting the interest
 of those over whom their jurisdiction
 extends.

The attempt has been made to induce
 legislatures to make the premium paid for
 such bonds a charge upon the estate; and
 it is not easy to distinguish between these
 costs and other costs deemed necessary
 for the protection and preservation of
 estates; but without legislative authoriza-
 tion courts decline to allow the expense
 of such bonds as costs of the administra-
 tion: *Eby's Estate*, 164 Pa. St. 249.

¹ As controlled by statutory provisions
 on this subject in the several States.

² See *post*, §§ 346 *et seq.*

³ *Ames v. Armstrong*, 106 Mass. 15;
Braxton v. State, 25 Ind. 82; *Pritchard v.*
State, 34 Ind. 137; *Moore v. State*, 49
 Ind. 558; in this case, Buskirk, C. J.,
 dissenting, says, "In my opinion, the cases
 of *Braxton v. State*, and *Pritchard v. State*,
 should be squarely overruled": p. 562.

⁴ *Post*, § 348.

tor, *as such*, is not liable for waste committed by his co-executor, nor for assets which the latter received and misapplied, without his own knowledge or fault.¹ But it is held in most States that the effect of giving a joint bond is to make the principals ^{but as sureties} liable for each other as sureties, so long as the joint ^{for each other.} administration continues;² while in some of them this doctrine is denied, and it is asserted that they are jointly liable for joint acts, and each separately liable for separate acts, because they signed as principals, and not as sureties.³ The principals are [* 559] * bound, however, to protect the joint sureties from the consequences of each other's acts;⁴ whether the sureties in a joint administration bond are liable to one of the joint administrators for the default of the other has been held both ways.⁵ An anonymous case is mentioned in a Pennsylvania report, where an insolvent administrator was allowed to recover against his own sureties for the benefit of the creditors of the estate; but the bond was not an administration bond, and the case does not affect the principle under consideration.⁶

§ 259. **Approval and Custody of Bonds.**—The administration bond must be approved and attested or certified by the court, judge, or clerk taking the same; if taken by the judge or clerk in vacation, it should be reported to and approved by the court at its next regular term; it should be recorded ^{Duties of court in approving bonds.} in a book kept for that purpose, and the original filed with the papers pertaining to the estate, and a careful compliance with the requirements of the statute with reference to the taking of bonds is

¹ *State v. Wyant*, 67 Ind. 25, 33, citing *Call v. Ewing*, 1 Blackf. 301, *Ray v. Doughty*, 4 Blackf. 115, and *Davis v. Walford*, 2 Ind. 88.

² *Brazier v. Clark*, 5 Pick. 96; *Newcomb v. Williams*, 9 Metc. (Mass.) 525; *Towne v. Ammidown*, 20 Pick. 535; *Boyd v. Boyd*, 1 Watts, 365; *Clarke v. State*, 6 Gill & J. 288; *Caskie v. Harrison*, 76 Va. 85, 93; *Green v. Hamberry*, 2 Brock. 403, 420; *Morrow v. Peyton*, 8 Leigh, 54; *Hooper v. Hooper*, 29 W. Va. 276, 299; *Eckert v. Myers*, 45 Oh. St. 525; *Albro v. Robinson*, 93 Ky. 195.

³ But the sureties are, of course, liable for the joint acts of both, and the separate acts of each: *Sandford, Ch.*, in *Kirby v. Turner*, reported in *Hopkins Ch.* 309; *Nanz v. Oakley*, 120 N. Y. 84; and see *State v. Wyant*, *supra*, quoting the dissenting opinion of *Buskirk, C. J.*, in *Moore v. The State*, 49 Ind. 558, "He executed the bond as a principal, and not as a surety,

and he cannot be held liable as a surety," and overruling the cases of *Braxton v. State*, *supra*, *Pritchard v. State*, *supra*, and *Moore v. State*, *supra*, to the extent of announcing that under the statute of Indiana there can be no joint administration bond, and where such a one is given it will be treated as the separate bond of each one of the principals.

⁴ *Little v. Knox*, 15 Ala. 576; *Dobyns v. McGovern*, 15 Mo. 662; *Stephens v. Taylor*, 62 Ala. 269; *Eckert v. Myers*, 45 Oh. St. 525; *McCoun v. Sperb*, 53 Hun, 165; *Albro v. Robinson*, 93 Ky. 195.

⁵ That they are not liable: *Nanz v. Oakley*, 37 Hun, 495; *Hoell v. Blanchard*, 4 Desaus. 21; that they are liable: see *State v. Wyant*, *supra*, and *Nanz v. Oakley*, 120 N. Y. 84, reversing s. c. in 37 Hun, *supra*.

⁶ *Gibson, C. J.*, in *Wolfinger v. Forsman*, 6 Pa. St. 294.

More strict in
some States
than in others.

the duty of judges and clerks. But, while the courts of some States require a strict and technical adherence to the directions of the statute, and hold bonds insufficient which are not taken in conformity therewith,¹ these formalities are generally deemed to be directory only, and a variance from them in matters not essential to the nature of the contract of the sureties will not affect the validity of the bond.² An administrator's bond is an official document, and cannot be removed from the office; if needed as evidence a *certified copy is sufficient.³ [* 560] If it as well as the record thereof is lost or destroyed, it may be substituted as the record of a probate court.⁴

§ 260. **Special Bonds.** — In some of the States special bonds are required to be given whenever it becomes necessary to sell real estate for the payment of debts or legacies, upon the theory that the ordinary administration bond covers only the personal estate coming into the hands of the executor or administrator. This subject is fully considered in connection with the sale of real estate by order of the probate court, to which, in order to avoid repetition, reference is hereby made.⁵ It appears from the authorities there cited, that in such case the sureties on the regular administration bond are not liable for the misapplication or loss of the funds arising from the sale of lands.⁶

Executor's
bond does not
extend to the
acts of the
same person
as trustee.

Where a will makes the same person executor and trustee, the executor's bond cannot be construed as conditioned for the performance of the duties belonging to the trustee; a separate bond should in such case be given as trustee.⁷

¹ Mathews v. Patterson, 42 Me. 257, holding that each probate bond must be specifically acted on by the probate judge, as required by the statute; see *ante*, § 256.

² Thus it is held in Missouri, that an administrator's bond is valid, though not approved by the court: James v. Dixon, 21 Mo. 538; Henry v. State, 9 Mo. 778; State v. Farmer, 54 Mo. 439; Brown v. Weatherby, 71 Mo. 152. So in Wisconsin: Cameron v. Cameron, 15 Wis. 1. In Georgia: Ford v. Adams, 43 Ga. 340. In Indiana: State v. Chrisman, 2 Ind. 126. In Alabama it was held that it is sufficient to raise a violent, if not a conclusive, presumption that the bond was received by the court as the security required by the statute, when it is found upon the files without any evidence accompanying it that it has been rejected, and that the principal has proceeded to execute the duties of his office: McClure v. Colelough, 5 Ala. 65, 72, resting upon the authority

of Bank of United States v. Dandridge, 12 Wheat. 64, and Apthorp v. North, 14 Mass. 167.

³ Miller v. Gee, 4 Ala. 359.

⁴ Tanner v. Mills, 50 Ala. 356. A minute entry of the court, reciting the appointment of the administrator, the approval of the bond, its amount, and the names of the sureties, is competent evidence, and, if not rebutted, sufficient to authorize the substitution. But a decree of substitution is not conclusive as to the execution of the bond.

⁵ *Post*, § 472.

⁶ See also Robinson v. Millard, 133 Mass. 236, denying the liability, although the administrator charged himself in his administration account; Probate Court v. Hazard, 13 R. I. 3, where the sale was under a power in the will, and numerous authorities on the subject are reviewed.

⁷ Hinds v. Hinds, 85 Ind. 312, 315.

It appears from a former chapter¹ that residuary legatees may in some States dispense with the necessity of official administration by giving bond to pay any debts that may be due from the testator, and legacies. Such bonds, when given by an executor who is also the sole or residuary legatee, operate as a conclusive admission of assets, because it is conditioned that the debts shall be paid, and are strongly discouraged in a New Hampshire case.²

¹ *Ante*, § 202.

² *Morgan v. Dodge*, 44 N. H. 255. See authorities under § 202.

* CHAPTER XXVIII.

[* 561]

OF THE PROCEDURE IN OBTAINING LETTERS AND QUALIFYING FOR THE OFFICE.

§ 261. **The Petition for the Grant of Letters Testamentary or of Administration.** — There was occasion in a former chapter¹ to point out the diversity of decisions upon the question of the validity or conclusiveness of the judgments and decrees of probate courts, and to show that in some of the States these are assailable in collateral proceedings, and will be held void unless the record recites all the facts upon which the jurisdictional power of the court to render them depends. In these States the rule is stated to be, that the record must show the facts giving jurisdiction, or the judgment rendered will be held void.² In the majority of States, however, the rule is less stringent, and jurisdiction will be either presumed or inferred from such facts as may be stated,

Rule requiring jurisdictional facts to be affirmatively shown by the record.

Relaxed in most States, and jurisdiction will be inferred in collateral

¹ On the Nature of Probate Courts in America, ch. xv., and especially §§ 145, 146.

² *Vick v. Vicksburg*, 1 How. (Miss.) 379, 439. It was held in this case that the appointment of an administrator *de bonis non* with the will annexed was void, because it did not aver the death or removal of the executor. So it is held in Illinois, that, before an estate can be committed to the public administrator, it must affirmatively appear that there is no relative or creditor in the State, and that the application was made by a party in interest, otherwise the proceedings will be *non coram iudice*, and void: *Unknown Heirs v. Baker*, 23 Ill. 484. In New York, to give validity to a deed of land executed under a sale by virtue of a surrogate's order, it must be affirmatively shown that an account of the personal estate and of the debts was presented to the surrogate: *Ford v. Wadsworth*, 15 Wend. 449; in Kentucky, that an order of the county court setting aside an executor and appointing an administrator should show

the reason for so doing: *Bronaugh v. Bronaugh*, 7 J. J. Marsh. 621. In Nebraska the petition for the appointment must allege the vital points conferring jurisdiction, or the proceeding will be void: *Moore v. Moore*, 33 Neb. 509. In Michigan, that the appointment of an administrator is void, unless the record shows all jurisdictional facts, *i. a.*, the interest of the applicant: *Shipman v. Butterfield*, 47 Mich. 487; *Haug v. Primeau*, 98 Mich. 91; *Besancon v. Brownson*, 39 Mich. 388, 392. In this State the jurisdictional facts which the petition must allege are that the person whose estate is to be administered died intestate, and was at the time of his death either an inhabitant or resident of the county in which the application is made, or, if he died out of the State, that he left an estate in the county to be administered. If these facts appear, the court has jurisdiction to appoint an administrator upon the petition of a party interested: *Wilkinson v. Conaty*, 65 Mich. 614, 621.

or from the judgment or decree itself.¹ So, for instance, the statement in the petition referring to the decedent as "late of" a county named, is held a sufficient averment of the decedent's domicile in such county at

[* 562] the *time of his death.² Although the petition must be verified, and the averment of the applicant "to the best of his knowledge and belief" is insufficient,³ yet objection on this score cannot be made in a collateral proceeding, and does not avoid the surrogate's jurisdiction.⁴ So it has been held, that, while an order appointing an administrator with the will annexed is defective in not showing that the executor named in the will refused to qualify, it is still valid if in fact he did so refuse; and this may be shown to support the order when collaterally questioned;⁵ and that *prima facie* evidence that unadministered assets remain is sufficient to support the appointment of an administrator *de bonis non* with the will annexed.⁶

But while it may not in all cases be absolutely necessary to support the jurisdictional power of the court by a recital of all the facts, yet it is of the highest importance that a record should be made of all facts and circumstances which call forth the judicial powers of the court. The petition of the applicant for letters affords the most convenient means for proper allegations, so that the finding upon it may constitute an adjudication of all the necessary facts. The averments should include, among other things, *first*, the death of the person whose estate is to be administered, his place of domicile at the time of his death, and whether he died testate or intestate; *next*, if he left a will, that it has been admitted to probate, and the name or names of the persons nominated executors; *third*, if the application be for letters of administration with the will annexed, that no executor has been named, or that all so named have renounced, died, or are incompetent to serve, and the circumstances conferring upon the applicant the right to administer the estate; *fourth*, the names of the widow, husband, next of kin, or heirs, as the case may be; *fifth*, the nature of the goods, effects, or other estate left by the deceased, and its estimated value; *sixth*, if the application be for letters of administration generally, the relation or kinship between the deceased and the applicant;

proceedings
from the judgment rendered.

What should
be shown by
the record.

Contents of
the petition
for letters.

¹ See *ante*, §§ 143, 145; Johnston v. Smith, 25 Hun, 171, 176; Robinson v. Epping, 24 Fla. 237.

² Abel v. Love, 17 Cal. 233; Townsend v. Gordon, 19 Cal. 188. These cases were decided under a statute construed as requiring jurisdictional facts to be shown of record to validate the judgment.

³ Sheldon v. Wright, 7 Barb. 39; Rodrigas v. East River Inst., 76 N. Y. 316.

⁴ Sheldon v. Wright, *supra*; Pleasants v. Dunkin, 47 Tex. 343; *In re* Miller, 32 Neb. 480. It seems that in Alabama the petition need not be sworn to: Davis v. Miller, 106 Ala. 154.

⁵ Peebles v. Watts, 9 Dana, 102.

⁶ Pumpelly v. Tinkham, 23 Barb. 321.

seventh, if the application be for letters * *de bonis non*, the [* 563] death, removal, or resignation of the former executor or administrator, or, if there were several, of all of them; *eighth*, if the decedent was at the time of his death a non-resident of the county, the existence of property within the county, or other circumstance showing the necessity of administration; and, *generally*, whatever facts may exist which, under the law of the State and the particular circumstances, may have a bearing upon the jurisdiction of the court to grant letters, the right of the applicant to be appointed, and the amount of the bond to be required, or whether any bond be necessary.¹

§ 262. **Notice to Parties entitled to Administer.** — It has already been shown² that letters granted to a stranger, or to one whose claim to the administration is inferior to that of another, will be revoked upon the application of one having a superior right, unless such applicant had been notified or cited before the grant was made. The grant to one of several parties having equal claims will not, as a general thing, be revoked for the want of notice, on the application of another, unless there be a statutory requirement to give notice or issue citation to all entitled; but it is evidently wise and just that notice should be given to all who are in the same degree of preferment, so that the most suitable person may be selected, and possible disqualifications or objections pointed out before the appointment is made.³ The petition of the applicant must, as already stated,⁴ show, among the other facts necessary to give the court jurisdiction, his interest in the estate to be administered;⁵ on the same principle, one showing no interest cannot intervene or object to an appointment.⁶ And where the statute provides for citation, it must be served upon all of those * having a prior right, who have not renounced, and must [* 564] conform to the requirements of the statute.⁷ Failure to cite

¹ The importance of embodying in the petition all the jurisdictional facts appears from the language of Judge Sawyer in a case decided in the Ninth Judicial District of the United States, arising upon the validity of letters granted by a county court in Oregon. The statute of that State provides that the applicant for letters of administration shall set forth in his petition the facts necessary to give the court jurisdiction; the petition under consideration set forth, *i. a.*, that the intestate was at the time of his death an inhabitant of the county in which letters were granted, and it is held, both by the District and the Circuit Court, that the grant of letters in response to the petition

constituted an adjudication of the question of residence unassailable collaterally, no matter how clear the fraud or error of the allegation be: *Holmes v. Oregon R. R. Co.*, 7 Sawy. 380. For cases holding that lack of jurisdiction cannot be asserted collaterally on the ground that decedent was not a resident of the county, see *ante*, § 204.

² *Ante*, § 243.

³ See *ante*, § 243, p. * 531.

⁴ *Ante*, § 261, p. * 561, note 2.

⁵ *Shipman v. Butterfield*, 47 Mich. 487; *Besançon v. Brownson*, 39 Mich. 388, 392.

⁶ *Succession of Berfuse*, 34 La. An. 599; *Drexel v. Berney*, 1 Dem. 163.

⁷ Hence, if the statute require the ap-

the widow, or the next of kin, is an irregularity, for which the letters may be revoked, but does not generally render them absolutely void;¹ yet it has sometimes been held to avoid the administration.² But one having such notice as would be conveyed by the statutory mode of service cannot complain that the statute was not observed;³ nor one who voluntarily enters an appearance.⁴

All parties to whom citation or notice is given, or who have a beneficial interest in the estate to be administered, may appear and oppose the appointment of a particular applicant; and the interest giving such a person a standing in court may be shown at the hearing, without having been previously adjudicated.⁵

Such parties have the right to appear and be heard upon the application for letters.

The statute, in some of the States, prescribes a limitation to the right of granting administration in a given number of years after the decedent's death.⁶

Time within which administration will be granted.

Provision is made in Massachusetts, that, upon due notice to legatees and creditors, letters testamentary may be granted to an executor without sureties on his bond; and it is held that publication in the newspaper of the executor's request is sufficient notice, although a minor is interested who has no guardian.⁷

Notice to legatees of application for letters testamentary without bond.

plicant to pray for the appointment of the *petitioner*, a citation conforming to an application praying for the appointment of the public administrator (not petitioning) is insufficient: *Batchelor v. Batchelor*, 1 Dem. 209, 211; s. c. in 64 How. Pr. 350.

¹ *Kelly v. West*, 80 N. Y. 139, 145; *Sheldon v. Wright*, 7 Barb. 39; *James v. Adams*, 22 How. Pr. 409; *Garrett v. Boling*, 37 U. S. App. 42, 60; and see, on this point, *ante*, § 243, p. *531, and authorities there mentioned.

² *Torrance v. McDougal*, 12 Ga. 526.

³ *Davis v. Smith*, 58 N. H. 16.

⁴ *Spencer v. Wolfe*, 49 Neb. 8.

⁵ Thus, a natural child pretending to have been legally acknowledged by her deceased parent can oppose the application of collateral heirs for the administration of the succession; and the proof of parentage and acknowledgment may be made on trial of the opposition in the application for administration: *Succession of Hébert*, 33 La. An. 1099. And see *post*, § 263.

⁶ In Connecticut administration cannot be granted after seven years from the death of the intestate; but a will may be

proved at any time within ten years after the testator's death: *Lawrence's Appeal*, 49 Conn. 411, 422. In Massachusetts, where administration may be granted more than twenty years after the decedent's death upon property which thereafter first comes to the knowledge of a person interested therein, if applied for within five years after it becomes known, knowledge is not necessarily to be imputed from the fact that such person was the brother of the intestate and knew of his death: *Parsons v. Spaulding*, 130 Mass. 83. In Illinois the limit is seven years, unless circumstances prevented an earlier application for letters: *Fitzgerald v. Glancy*, 49 Ill. 465, 469. Statutory provisions are also found in Iowa: *Phinny v. Warren*, 52 Iowa, 332; and Texas: *Patterson v. Allen*, 50 Tex. 23 (four years), 25. In Tennessee administration cannot be granted (with certain exceptions) more than twenty years after the decedent's death: *Rice v. Henly*, 90 Tenn. 69; in Kentucky administration granted after twenty years is declared to be void: *Gen. St. 1894*, § 3895.

⁷ *Wells v. Child*, 12 Allen, 330.

* § 263. **Nature of the Proceeding.** — The grant of letters is [* 565] said to be a proceeding *in rem* in the strictest sense,¹ and in

Proceedings said to be *in rem*. a contest for the right of administration there are strictly no parties plaintiff or defendant. The applicants are all actors, some of whom may withdraw and others come in at any time during the progress of the cause, even after appeal.² The decedent's property rights should not be litigated in such proceedings.³ Objections to the grant of letters will be heard

Any person in interest may be a party. from any person claiming under oath to be interested. If his right to appear is disputed, the question will be decided upon proof,⁴ and if it be found that he is a mere stranger, and not interested as creditor, heir, or legatee, he cannot be heard even to object that there are other persons having priority over the applicant under the law.⁵ The grant must be during the term succeeding the publication of notice and citation by the clerk, where such notice and citation are required; but the application may be continued from term to term by order of the court, without new notice; parties in interest are bound to take notice of such continuances.⁶ This subject is more fully considered in the chapter on the Nature of American Probate Courts.⁷

§ 264. **Nature of the Decree, and its Authentication.** — Letters testamentary or of administration can be granted only by the decree or order of the probate court in term time;⁸ but provision is made in most of the States, that during vacation letters may be issued by the judge or clerk of the court, which will be ratified by the court at the next regular term thereof unless valid objection be made against the appointee.⁹ Appointment by the clerk without action of the court is held to be a ministerial, not a judicial act, and therefore

¹ Quidort v. Pergeaux, 18 N. J. Eq. 472, 477.

² Atkins v. McCormick, 4 Jones L. 274.

³ *In re McCarty*, 81 Mich. 460; Grimes v. Talbert, 14 Md. 109.

⁴ Burwell v. Shaw, 2 Bradf. 322; Ferris's Will, Tuck. 15. See *ante*, p. * 564.

⁵ Burton v. Burton, 4 Harr. 73.

⁶ McGehee v. Ragan, 9 Ga. 135.

⁷ *Ante*, § 148.

⁸ Lawson v. Mosely, 6 La. An. 700. As to public administrators acting without appointment, see *ante*, § 180.

⁹ Brown v. King, 2 Ind. 520, holding that where in such case a person notifies the clerk that he is a creditor and intends to apply for letters as soon as the law permits, this was held not such a controverting of the right to administer as was

contemplated by the statute to deny the authority of the clerk to appoint; and see Rayburn v. Rayburn, 34 W. Va. 400 (by a divided court); Judd v. Ross, 146 Ill. 40, holding that where the clerk issues the letters to one before the statutory period had expired within which others had a prior right to the appointment, but where the record failed to show when the court had approved the appointment, it would be presumed in a collateral proceeding that such approval was not made until authorized by law. It is held, that letters granted in vacation are valid until rejected by the court, and that subsequent action by the court, recognizing the grant, will constitute a valid approval, without a formal entry of confirmation of record: Macey v. Stark, 116 Mo. 481, 496.

its validity may be inquired into collaterally.¹ Letters purporting to be granted by the proper authority, in due form, and [* 566] *sealed with the office seal of the court, are good without the signature of the clerk until set aside for informality.²

But in Louisiana, where the probate judges may appoint administrators of estates of less value than \$500 without the notice or bond required in other cases, when no one would give the bond, and clerks are authorized to administer small successions, it is held that neither of these provisions authorizes the clerk to appoint administrators.³ And letters cannot be issued by a deputy clerk in his own name.⁴

The memorandum by the clerk of the qualifying of the executor, immediately following the entry of the will of record, is sufficient record evidence of the grant of letters testamentary and qualification of the executor; and the failure of the clerk to record letters testamentary as required by the law does not vitiate his authority.⁵ But the authority of the clerk to appoint administrators does not relieve them of the necessity of rendering an order in making the appointment; and until such order is rendered, the appointment is invalid, and a party with a better right to such appointment is in time to present his application.⁶

Failure of the clerk to record the order of appointment does not vitiate letters.

The delivery of letters is not necessary.⁷ The order by the proper court, that "R. be and hereby is appointed administrator on giving proper bond," fixing the amount of the bond and the surety, is an absolute and not a conditional grant, if the bond be filed on the same day.⁸ Possession of letters by the person to whom they purport to have been granted, is *prima facie* proof of delivery;⁹ and the proper proof of appointment is the letters of administration or a certified copy thereof, or of the order of appointment.¹⁰ The words "given under my hand and seal of office," with date and signature of the ordinary, constitute a sufficient authentication of letters of administration;¹¹ and a clerk's certificate, with his signature and official seal, is complete evidence of the appointment;¹² [* 567] but letters not authenticated by the seal of the court *grant-

Appointment valid, though letters are not delivered.

Evidence of authority.

¹ Illinois Central R. R. Co. v. Cragin, 71 Ill. 177, 180.

² Post v. Caulk, 3 Mo. 35.

³ Wilson v. Imboden, 8 La. An. 140. But see Succession of Picard, *infra*, referring to the act of 1880, authorizing clerks to issue letters.

⁴ Stewart v. Cave, 1 Mo. 752.

⁵ Wright v. Mongle, 10 Lea, 38.

⁶ Succession of Picard, 33 La. An. 1135. Letters, issued in the absence of an order therefor signed by the judge or clerk, are void: Wirt v. Pintard, 40 La. An. 233.

⁷ State v. Price, 21 Mo. 434; Bowman's Appeal, 62 Pa. St. 166; Weir v. Monahan, 67 Miss. 434, 448.

⁸ Tucker v. Harris, 13 Ga. 1; Hoskins v. Miller, 2 Dev. L. 360.

⁹ McNair v. Dodge, 7 Mo. 404; Hensley v. Dodge, 7 Mo. 479. See Eller v. Richardson, 89 Tenn. 575.

¹⁰ Davis v. Shuler, 14 Fla. 438.

¹¹ Witzel v. Pierce, 22 Ga. 112. And see Harris v. Chipman, 9 Utah, 101.

¹² Davie v. Stevens, 10 La. An. 496.

ing them are inoperative, and not admissible in evidence.¹ A sheriff is not by virtue of his office the administrator of any deceased person; he must first be empowered to act by the probate court.² A widow testifying that "she was acting in the capacity of surviving wife of her deceased husband" does not thereby prove that she had properly qualified to enable her to control the community estate.³

§ 265. **Oath of Office.** — The oath of office which executors and administrators are required to take before entering upon the discharge of their duties is the decisive ceremony clothing them with the title to the personal property of the deceased testator or intestate, and all the authority and responsibility connected with their office. The refusal of an executor to take this oath is, even in England, tantamount to a refusal of the executorship, and must be so recorded. So the refusal to give bond and take the oath required by the law amounts to the refusal of the office of administrator.⁴ The form of the oath is usually prescribed by statute, and may be administered by the judge or clerk of the probate court; but this is not essential; it may be taken before any officer competent to administer oaths, and transmitted to the probate court.⁵ Unless they qualify, neither an executor nor an administrator has authority to act; what they attempt to do as such is void,⁶ or the act of an executor *de son tort*.⁷

In some States it is necessary for the administrator to take an additional oath before selling real estate under order of the probate court. This is treated of in connection with the sale of real estate for the payment of debts.⁸

¹ Tuck v. Boone, 8 Gill, 187.

² Hence a judgment entered against a "sheriff as administrator *ex officio*" cannot bind the estate: Davis v. Shuler, *supra*.

³ Roberts v. Longley, 41 Tex. 454.

⁴ Burnley v. Duke, 1 Rand. 108; Munroe v. James, 4 Munf. 194, 198.

⁵ Succession of Penny, 13 La. An. 94. The oath may be taken before ap-

pointment: Morris v. Chicago, R. I. & Pac. R. R., 65 Iowa, 727.

⁶ Moore v. Ridgeway, 1 B. Mon. 234; Carter v. Carter, 10 B. Mon. 327. Where letters of administration are granted, the fact that the oath is not taken until after the letters are issued, is an irregularity merely: Gallagher v. Holland, 20 Nev. 164.

⁷ *Ante*, ch. xxi.

⁸ *Post*, § 472.

[* 568]

* CHAPTER XXIX.

ON THE REVOCATION OF LETTERS TESTAMENTARY AND OF
ADMINISTRATION.§ 266. **Conclusiveness of the Decree or Order granting Letters.** —

Letters testamentary and of administration, granted by a court having jurisdiction for such purpose, are, while unrepealed, conclusive evidence of the authority of the grantees, and cannot be impeached collaterally, even for fraud,¹ although they may be revoked or annulled in the method pointed out by statute to that end, in a direct proceeding, or by appeal. Until such revocation by the decree of a competent court, or appeal, it cannot be questioned in either a common-law or chancery court, and it follows that the acts of an executor or administrator are valid, even though the probate of the will or the grant of letters was erroneous, or obtained upon fraudulent representations, or under a forged will.² The binding necessity of this principle has been enlarged upon in a previous chapter, in connection with the subject of jurisdiction of probate courts,³ and again when considering the nature of the proof necessary

Letters cannot
be questioned
collaterally,

but may be
revoked or
annulled in a
direct proceeding.

¹ See on this subject, *ante*, ch. xv., and especially §§ 145, 146. Among the cases specially holding that letters testamentary and of administration cannot be questioned in a collateral proceeding may be mentioned: *Sadler v. Sadler*, 16 Ark. 628, 632; *Simmons v. Saul*, 138 U. S. 439; *Bryan v. Walton*, 14 Ga. 185, 196; *Emery v. Hildreth*, 2 Gray, 228; *Flinn v. Chase*, 4 Denio, 85; *Burnley v. Duke*, 2 Robins. (Va.) 102, 129; *Morgan v. Locke*, 28 La. An. 806; *James v. Adams*, 22 How. Pr. 409; *Riley v. McCord*, 24 Mo. 265, 269; *Quidort v. Pergeaux*, 18 N. J. Eq. 472; *Belden v. Meeker*, 47 N. Y. 307; *Pleasants v. Dunkin*, 47 Tex. 343; *Buehler v. Buffington*, 43 Pa. St. 278, 293; *Hart v. Bostwick*, 14 Fla. 162, 174; *Succession of Lee*, 28 La. An. 23, 24; *Barclay v. Kimsey*, 72 Ga. 725; *Plume v. Howard Savings Institution*, 46 N. J. L. 211; *Wheat v. Fuller*, 82 Ala. 572; *Kling v. Connell*, 105 Ala. 590; *Ex parte Crafts*, 28 S. C. 281;

Johnson v. Johnson, 66 Mich. 525; *Mills v. Herndon*, 77 Tex. 89; *Missouri P. R. Co. v. Bradley*, 51 Neb. 596.

² *Peebles' Appeal*, 15 S. & R. 39; *Kittredge v. Folsom*, 8 N. H. 98; *Schluter v. Bowery Bank*, 117 N. Y. 125, 130; *Franklin v. Franklin*, 91 Tenn. 119; *Allen v. Dundas*, 3 Term Rep. 125 (case of a forged will); *Spencer v. Cahoon*, 4 Dev. L. 225; *Record v. Howard*, 58 Me. 225, 228; *Fisher v. Bassett*, 9 Leigh, 119; *Price v. Nesbitt*, 1 Hill (S. C.) Ch. 445, 461; *Benson v. Rice*, 2 N. & McC. 577; *Shephard v. Rhodes*, 60 Ill. 301; *Smith v. Smith*, 168 Ill. 488, 496; *Thompson v. Samson*, 64 Cal. 330, 332; *Seldner v. McCreery*, 75 Md. 287, 295; *Reed v. Reed*, 91 Ky. 267; *Hudnall v. Han*, 172 Ill. 76. And see, as to the effect of the annulment of a will on contest on the distribution previously made, text near end of § 227.

³ *Ante*, §§ 145, 146.

to establish the residence and death of the testator or intestate.¹ The effect of appeal from the grant of * letters will [* 569] be considered in connection with the general subject of appeals from judgments or orders of the probate court.²

Letters granted by a court having no jurisdiction, being void, gain no validity by the mere lapse of time. Sales of real estate have been held void, and the purchaser for that reason held to have obtained no title, more than twenty years afterward.³ Nor can letters granted during the pendency of a contest of the will, which are on that account void, be supported as a grant of letters *pendente lite*.⁴ But where the authority is suspended by an appeal from the decree appointing the administrator, it is revived upon dismissal of the appeal, and dates back to the original appointment without further action.⁵ It is held in Minnesota, that the appointment of an administrator, where one already exists, although not authorized by the statute, is a mere irregularity, but not void,⁶ but in North Carolina such second appointment is void.⁷ An appointment made by a court having no jurisdiction is a nullity; hence the appointment of another, by a court having jurisdiction, as administrator of the same estate, is good without formally annulling the first appointment.⁸

§ 267. **Jurisdiction to revoke Letters.** — The power to revoke the authority of executors (which in England is usually termed the revocation of probate⁹) and of administrators is in some States ex-

¹ *Ante*, §§ 204–211.

² *Post*, §§ 542 *et seq.*

³ *Holyoke v. Haskins*, 5 Pick. 20.

⁴ *Slade v. Washburn*, 3 Ired. L. 557.

⁵ *Fletcher v. Fletcher*, 29 Vt. 98. See on this point *post*, § 547, p. *1204.

⁶ *Culver v. Hardenbergh*, 37 Minn. 225. As to the nullity of appointing an administrator *de bonis non* before the office of the administrator in chief has been vacated by death, resignation, or removal, see *ante*, § 180, p. *395; also, as to the appointment of another administrator for the same succession in the same State, by another court, or the court of another county, *ante*, § 204, p. *439.

⁷ *Bowman's Estate*, 121 N. C. 373.

⁸ *Ex parte Barker*, 2 Leigh, 719.

⁹ The change introduced in most of the American States, of ascribing the authority of the executor to the appointment by the probate court, rather than to the nomination by the testator, as in England, which has been commented on in connection with the subject of the distinction between executors and adminis-

trators (*ante*, § 171), renders it necessary to distinguish between the revocation of probate — the consequence of which would seem to destroy the validity of the will — and the removal of the executor, or revocation of the letters testamentary granted to him, which leaves all the testamentary dispositions intact, except as to the nomination of the person who is to execute them: *Schoul. Ex.* § 157, note (4). In those States in which the authority of the executor is conditioned upon appointment by the probate court, it seems inaccurate to confound the revocation of probate with the removal of the executor; for though the former conditions the latter as a necessary incident, yet the latter does not condition the former. So with regard to administration: revocation of administration would seem to imply that there is no estate liable to be administered, and, as a necessary consequence, that no one has authority as administrator; while the revocation of letters granted only withdraws the authority of the person administering, which may be conferred upon

exercised by courts of equity, when they obtain [* 570] jurisdiction over the executor or *administrator, under the well-known rule, that, where a court of equity obtains jurisdiction for one purpose, it will retain it until full and satisfactory justice is rendered to all the parties concerned.¹ Thus, in a case calling for the intervention of chancery, an executor may be restrained from squandering and disposing of the property of his testator, and removed, or a receiver appointed;² and an administrator may be removed.³ But where this authority exists in courts of chancery at all, it will be exercised in extreme cases only.⁴

Power to revoke authority of executors or administrators is in some States exercised by courts of equity;

but in extreme cases only,

In most of the States, however, the power to revoke the letters granted, or, as it is more usually termed, to remove an executor or administrator, is vested exclusively in the probate courts;⁵ superior courts exercising, in such cases, appellate jurisdiction only,⁶ or granting the assistance of equity where the lower court is without the necessary power to accomplish justice.⁷

and is in most States vested exclusively in probate courts.

some other person.—The consequences, therefore, of a revocation of *probate*, or of *administration*, must be to annul the will, or basis of administration, constituting rather a judicial declaration that the will, or estate demanding administration, never existed, while the removal of the executor or administrator, or the *revocation of letters* testamentary or of administration, is followed by the same consequences as would be brought on by the death of the executor or administrator.

¹ Walker v. Morris, 14 Ga. 323. The Code of Georgia provides that "the judgment of a court of competent jurisdiction may be set aside by a decree in chancery, for fraud, accident, or mistake, or the acts of the adverse party unmixed with the negligence or fault of the complainant": Code, 1882, § 3595 (§§ 3537, 3514, of former codes), which is held to authorize the revocation of letters of an executor or administrator by decree in chancery. See Bivins v. Marvin, 96 Ga. 268.

² Chappell v. Akin, 39 Ga. 177; Cooper v. Cooper, 5 N. J. Eq. 9, 11; Bolles v. Bolles, 44 N. J. Eq. 385; Clemens v. Caldwell, 7 B. Mon. 171; Walters v. Hill, 27 Gratt. 388, 401; Long v. Wortham, 4 Tex. 381; Wilkins v. Harris, Winst. Eq.

(Part II.) 41; Harmon v. Wagener, 33 S. C. 487, 496; Werborn v. Kahn, 93 Ala. 201; Henry v. Henry, 103 Ala. 582; Bivins v. Marvin, 96 Ga. 268. And see discussion of concurrence of probate and chancery jurisdiction over administrators in the case of Goodman v. Kopperl, 67 Ill. App. 42, 48, *et seq.* (s. c. affirmed 169 Ill. 136).

³ Wallace v. Walker, 37 Ga. 265. The administrator, who had obtained letters of administration by fraudulently representing that the deceased died intestate, knowing that he had left a will, was removed upon the suit of a foreign executor, under a statute authorizing the domiciliary executor of another State to use all process and remedies as if he had qualified in Georgia.

⁴ Randle v. Carter, 62 Ala. 95, 101; Goodman v. Kopperl, 169 Ill. 136.

⁵ Hosack v. Rogers, 11 Pai. 603, 606; Chew v. Chew, 3 Grant Cas. 289; Taylor v. Biddle, 71 N. C. 1, 5; Holbrook v. Campau, 22 Mich. 288; Succession of Williams, 26 La. An. 207; Bolles v. Bolles, 44 N. J. Eq. 385.

⁶ Ledbetter v. Lofton, 1 Murph. 224; Wilson v. Frasier, 2 Humph. 30.

⁷ Leddel v. Starr, 19 N. J. Eq. 159, 163.

§ 268. Recall of Letters granted without Authority in the Court.

— It is evident that the judgment or decree of any court is conclusive and binding upon the court rendering it, as well as against all the world.¹ Hence, where the probate court has once regularly conferred the appointment, it cannot remove the incumbent except for causes recognized by the law as sufficient, and in the manner authorized by statute. But it is an inherent power in every judicial tribunal to correct an error which it may have * committed, when no [* 571] positive rule of law forbids it.² "This power," says Gray, J., "does not make the decree of a court of probate less conclusive in any other court, or in any way impair the probate jurisdiction, but renders that jurisdiction more complete and effectual."³ It is, therefore, the duty of the court, upon the application of any party in interest, or even *ex mero motu*,⁴ to annul or revoke letters granted upon proof of the death of a person who subsequently appears alive;⁵ or where it is shown that there was no jurisdiction, the decedent being domiciled at the time of his death in another county,⁶ or that he was a non-resident of the State having no property therein,⁷ or that the will was admitted to probate through fraud or error,⁸ or that a later will or codicil should be admitted;⁹ or where a will is found to have been already probated,¹⁰ or is discovered after grant of letters of administration generally;¹¹ or where an administrator with the will annexed is appointed in derogation of the executor's right,¹² or one not preferred is appointed administrator before the expiration of the period during which pref-

Letters properly granted can be recalled only for cause;

but if granted without authority in the court, may be recalled at any time,

on motion of some party in interest, or *ex mero motu*.

¹ See *ante*, § 146.

² *McCabe v. Lewis*, 76 Mo. 296, 301; "The power to revoke is necessarily inherent in the Orphan's Court, and a part of the essence of the power delegated to them of granting administration": *Dalrymple v. Gamble*, 66 Md. 298, 311.

³ *Waters v. Stickney*, 12 Allen, 1, 15.

⁴ *County Court v. Bissell*, 2 Jones L. 387; *Watson v. Glover*, 77 Ala. 323, 325; see *Radford v. Gaskill*, 20 Mont. 293, 295.

⁵ See *ante*, §§ 208-211, on the validity of administration on the estate of a person who is not in reality dead, and authorities there cited. *Donaldson v. Lewis*, 7 Mo. App. 403.

⁶ *Wilson v. Frazier*, 2 Humph. 30; *Johnson v. Corpenning*, 4 Ired. Eq. 216. The grant in such case is not absolutely void, but only voidable: see cases cited *ante*, § 204.

⁷ *Mallory v. Railroad*, 53 Kans. 557.

The jurisdiction to grant letters on estates of deceased non-residents of the State is discussed *ante*, § 205.

⁸ *Hamberlin v. Terry*, 1 Sm. & M. Ch. 589.

⁹ *Waters v. Stickney*, 12 Allen, 1, 4.

¹⁰ *Watson v. Glover*, 77 Ala. 323.

¹¹ *Edelen v. Edelen*, 10 Md. 52, 56; *Patton's Appeal*, 31 Pa. St. 465; *Kittredge v. Folsom*, 8 N. H. 98, 107; *Broughton v. Bradley*, 34 Ala. 694. If properly authenticated it makes no difference that it is a foreign will: *Dalrymple v. Gamble*, 66 Md. 298. The letters of administration so granted are voidable only: *post*, § 274. But where full administration has been had and final distribution decreed, it is not necessary that such decree be first revoked before probating the will: *Stackhouse v. Berryhill*, 47 Minn. 201.

¹² *Baldwin v. Buford*, 4 Yerg. 16.

erence is given by statute to others;¹ or where administration is improperly granted, there being no estate to administer;² or where it is granted to a person or by a judge disqualified,³ or by [* 572] mistake to one not * preferred,⁴ or who refuses to give bond;⁵ or where an administrator *de bonis non* was appointed while there was an acting executor or administrator.⁶ In all of these cases the letters granted are either void — in which event it is the duty of the court to revoke, or rather to declare null, its appointment, so as to correct the record and prevent further mischief from being done, as soon as the true facts become known to it, whether by evidence, or otherwise — or they are voidable, and may be revoked upon the application of some person having an interest in the estate, and upon notice or citation to the person to be removed.⁷

§ 269. **Theory of Removal for Cause.** — The grounds upon which an executor or administrator will be removed for cause are manifold, and are commonly designated in the statutes. In Missouri the statute provides for the revocation of letters in the following cases, which may be looked upon as a fair and comprehensive *résumé* of the provisions on this subject in the several States: "If any executor or administrator become of unsound mind, or be convicted of any felony or other infamous crime, or has absented himself from the State for the space of four months, or become an habitual drunkard, or in any wise incapable or unsuitable to execute the trust reposed in him, or fail to discharge his official duties, or waste or mismanage the estate, or act so as to endanger any co-executor or co-administrator, the court,

Instances of
statutory
causes for
removal.

¹ Mullanphy v. County Court, 6 Mo. 563; Mills v. Carter, 8 Blackf. 203; Williams's Appeal, 7 Pa. St. 259; Thompson v. Hockett, 2 Hill (S. C.) 347; Dunham v. Roberts, 27 Ala. 701; Barber v. Converse, 1 Redf. 330; Stoeve v. Ludwig, 4 S. & R. 201; Skidmore v. Davies, 10 Pai. 316; Vreedburgh v. Calf, 9 Pai. 128; Proctor v. Wanmaker, 1 Barb Ch. 302; Public Administrator v. Peters, 1 Bradf. 100; McCaffrey's Estate, 38 Pa. St. 331; Neidig's Estate, 183 Pa. St. 492; Wilson v. Hoss, 3 Humph. 142; Moore v. Moore, 1 Dev. 352; Kerr v. Kerr, 41 N. Y. 272, 278.

² Estate of Huckstep, 5 Mo. App. 581, 582; Townsend v. Pell, 3 Dem. 367.

³ As where the probate judge granting letters is interested in the estate: Cottle, Appellant, 5 Pick. 483; Sigourney v. Sibley, 21 Pick. 101, and s. c. 22 Pick. 507; or letters are granted to his son: Koger v. Franklin, 79 Ala. 505; or to a minor: Carow v. Mowatt, 2 Edw. Ch. 57;

Davis v. Miller, 106 Ala. 154 (where one appointed was a minor, but ratified the appointment on reaching majority).

⁴ Morgan v. Dodge, 44 N. H. 255; or upon fraudulent representations: ante, § 146; Marston v. Wilcox, 2 Ill. 60; and when made *ex parte*, even if the fraudulent representation be the result of carelessness or mistake, and made by one entitled in the same class with others, and who might have been entitled had the true state of facts been given: Lutz v. Mahan, 80 Mo. 233. In New York, the "false suggestion of a material fact" authorizing the revocation of letters must be made to the tribunal granting the letters, and not to one preferred to administer: Corn v. Corn, 4 Dem. 394.

⁵ Morgan v. Dodge, *supra*.

⁶ Creath v. Brent, 3 Dana, 129; Springs v. Erwin, 6 Ired. L. 27; Griffith v. Frazier, 8 Cr. 9.

⁷ Gary Pr. L. § 314; Schoul. Ex. § 155; see *infra*, § 269, and *post*, § 274.

upon complaint in writing, made by any person interested, supported by affidavit, and ten days' notice given to the person complained of, shall hear the complaint, and, if it finds it just, shall revoke the letters granted."¹ In addition to this, it is made the duty of the court to revoke letters of administration whenever a will of the supposed intestate is found and receives probate, and letters testamentary when the probate of a will upon which they were issued shall be set aside;² and also to revoke the letters of an executrix or administratrix upon her * marriage,³ and of an executor [* 573] or administrator becoming non-resident;⁴ and when an executor or administrator fails, upon service of citation, or publication of citation if he cannot be found, to make settlement, his letters may be revoked.⁵ In the nature of things, a power which may be

Discretion to be exercised by court.

invoked in such a variety of instances must largely depend upon the discretion of the judge for its proper exercise. It is easy enough to legally ascertain whether a man has been adjudged insane, or convicted of infamous crime, or become a non-resident or an habitual drunkard; or whether an executrix has married. But it is also apparent that these facts do not in themselves constitute incapacity to administer: they are the mere *indicia* from the existence of which the law conclusively presumes the existence of the incapacity.⁶ In contemplation of law the incapacity may exist without these, or any specially defined symptoms; hence, in its solicitude to protect estates of deceased persons and secure efficient administration thereof, it clothes the judge of probate with power to ascertain the incapacity from other sources, — if he become "*in any wise* incapable or unsuitable to execute the trust,"⁷ or "fail to discharge his official duties," or "waste or mismanage the estate," — and if ascertained, to revoke the authority granted. Where the interest of the administrator is adverse to the estate, for instance, it is clear that he is an "unsuitable" person to

¹ Rev. St. 1889, § 42.

² *Ib.*, §§ 39, 40.

³ *Ib.*, § 41.

⁴ *Ib.*, § 10.

⁵ *Ib.*, § 221. Before the revision of 1879 revocation was compulsory in such case. See Wagner's Statutes, ch. 2, art. v., § 8; but in the revision of 1879 the word "shall" was changed to "may."

⁶ The court's discretion will not be reviewed unless abused: *McFadden v. Ross*, 93 Ind. 134; *In re Graber*, 111 Cal. 432; *Holladay's Estate*, 18 Oreg. 168. In *Bowen v. Stewart*, 128 Ind. 507, it is held that a proceeding to remove an administrator is a proceeding in which the statute for change of venue does not apply. In Indiana it is held that habitual drunken-

ness is cause for the removal of an administrator, without also showing that the administrator had thereby become incapable of discharging his duties: *Gurley v. Butler*, 83 Ind. 501. The statute in this State provides that an administrator may be removed "where, . . . from habitual drunkenness, . . . he is rendered incapable of discharging his trust to the interest of the estate."

⁷ In Pennsylvania the Orphan's Court removed two executors on the ground that one was largely insolvent, and the acts of the other were "of a character so doubtful that we feel that the estate would be subject to risks at his hands, from which it should be relieved": *Estate of Greentree*, 12 Phila. 10.

administer it, and in such case nothing but some controlling necessity will justify his retention as administrator.¹ So where there is such hostility between the administrator and the legatees or distributees as will prevent a proper management of the estate.²

[* 574] The discretion vested in *judges of probate is, therefore, not an arbitrary one, as at one time Not arbitrary, it was supposed to be in the ordinary at common law,³ who might repeal an administration at his pleasure, nor yet so narrow as to prevent him from granting administration to nor too narrow, the wife after appointing the father, in ignorance of the existence of a wife, on the ground that, having exercised the power of appointment, his hands are closed;⁴ but to be exercised in furtherance of the paramount end and aim of the law. but in furtherance of the object of the law. Such is the law in every State of the Union, although couched in different phraseology, — as well as, at this day, in England.⁵ Yet, while the safety and efficient administration of the estate is the paramount object to be accomplished, courts will not permit this consideration to control personal rights, or to lead to the impeachment of the competency or integrity of an appointee merely because some other person may be better qualified for the trust. Where the appointment of an administrator is left to the unconditioned discretion of the judge, he will be controlled by this consideration in making the selection; but having made it, the appointee can be removed only upon proof of such facts as constitute a breach of the trust, in ascertaining which the judge may be aided by considering whether the conduct or acts complained of render the principal liable on his bond; since, as a general proposition, the liability of the surety arises only upon misconduct of the principal. An administrator cannot be removed on the sole ground that one better qualified may be appointed. And there should No revocation without notice. never be a revocation without due notice to the party, informing him of the matters alleged against him, and enabling him [* 575] to defend.⁶ It *is held in California, that the administra-

¹ Kellberg's Appeal, 86 Pa. St. 129.

² Kimball's Appeal, 45 Wisc. 391.

³ Wms. Ex. [576], who quotes Brown v. Wood, Aleyn, 36.

⁴ Sir George Sands' Case, Siderfin, 179.

⁵ "It is now agreed that the administration, though granted to the next of kin, may be repealed by the court, not arbitrarily, yet where there shall be just cause for so doing; of which the temporal courts are to judge": Wms. on Ex. [577].

⁶ An administrator cannot be removed without legal cause, defined in the statute, and after notice to him: Bieber's Appeal, 11 Pa. St. 157; Wingate v. Wooten, 5

Sm. & M. 245; Muirhead v. Muirhead, 6 Sm. & M. 451; Hanifan v. Needles, 108 Ill. 403; Schroeder v. Superior Court, 70 Cal. 343; Murray v. Oliver, 3 B. Mon. 1; Gasque v. Moody, 12 Sm. & M. 153; Godwin v. Hooper, 45 Ala. 613; Vail v. Givan, 55 Ind. 59; Hostetter's Appeal, 6 Watts, 244; Levering v. Levering, 64 Md. 399, 410; Patten's Estate, 7 Mackey, 392, 404. But in Mississippi the revocation was held proper without notice, where, upon the complaint of his surety, citation issued to the administrator, which could not be served because he was a non-resident of the State: Hardaway v. Parham, 27 Miss.

Right to jury trial. tor has no right to have the issues tried by a jury;¹ but in Indiana, this is doubted.² In the latter State, and in North Carolina, an answer to the application and other pleadings may be filed.³

§ 270. **Causes justifying Revocation of Letters.** — There are numerous adjudications indicating the particular acts or line of conduct which require the removal from office of an executor or administrator, as well as those which do not justify the revocation of their authority. The most fruitful source of trouble and litigation is the unwarranted application of the trust funds to the private use of the executor, administrator, guardian, or curator, and one which but too often leads to their own financial ruin, as well as the destruction of the estates committed to their care. The temptation to employ the funds in the hands of a trustee in private speculations promising ample returns, or even in his own apparently safe and lucrative business is sometimes overpowering in unscrupulous persons, but equally fraught with most disastrous results when yielded to in good faith, and without suspicion that it involves a violation of the law. Absurd as it may appear, yet many of the cases under this branch of the law concern those who in good faith believe, and many more those who make a specious pretence of believing, that a guardian or administrator, having been appointed to take charge of an estate, and, it may be, given bond for its faithful administration, may legally treat the funds as their own, being liable only to produce them when the proper time shall arrive. An estate in the hands of such a person is not safe, and it would seem that he is "unsuitable to execute the trust reposed in him."⁴

103. And so in South Carolina: McLaurin v. Thompson, Dudley, 335, the appointment of another being held a sufficient revocation of the authority of an administrator who left the State. In Alabama notice by publication is sufficient to a non-resident executor or administrator: Crawford v. Tyson, 46 Ala. 299. So in California it is held that the probate court may revoke letters and appoint a new administrator without notice to an administrator who has been judicially declared insane, or, it seems, convicted of crime; *In re Blinn*, 99 Cal. 216.

¹ Doyle's Estate, Myr. 68.

² Phelps v. Martin, 74 Ind. 339, 341; but see McFadden v. Ross, 93 Ind. 134.

³ McFadden v. Ross, *supra*; Edwards v. Cobb, 95 N. C. 4, 9, commenting on the method of procedure.

⁴ Hence, where a trustee for minor children had, although with a good inten-

tion, and not through dishonesty or want of fidelity, neglected to keep the fund invested, mingled it with his own and used it, and claimed to have appropriated the whole of it in a manner not authorized, although for the benefit of the *cestui que trust*, Jones, J., of the Superior Court of the City of New York, held, that "one who has so failed properly to understand his duties, and by reason of such failure has exposed the fund to the hazard of being lost by his insolvency, has in fact allowed the *corpus* to be eaten up, and keeps the fund still exposed to hazard and loss by reason of business vicissitudes, and also exposed to entangling litigation in case of his decease, should not be retained as trustee": Deen v. Cozzens, 7 Robt. (N. Y.) 178. To the same effect, Clemens v. Caldwell, 7 B. Monr. 171; Hake v. Stott, 5 Col. 140. So the sale of stock belonging to the estate in his indi-

[* 576] * Accordingly, one who is squandering the estate,¹ or is wasting, neglecting, or mismanaging it,² or guilty of gross carelessness in its management,³ or refuses to inventory property pointed out to him as having been conveyed in fraud,⁴ or to redeem property at the request of a creditor,⁵ or fails to make and return an inventory of the estate,⁶ or to perform the duties of his trust,⁷ or the orders of court in reference thereto,⁸ or gives unauthorized preference to creditors,⁹ or conveys property of the estate to his sureties to indemnify them,¹⁰ or procures the fraudulent allowance of a claim in his own favor against the estate,¹¹ or fails to render his annual account when required,¹² will be removed, and an administrator *de bonis non* appointed. So where one, who was a resident of the State when appointed, becomes a non-resident;¹³ but in Georgia it is held that the removal from the State of either an executor or an administrator after appointment is not a sufficient ground to revoke his authority;¹⁴ in Vermont, he will not be removed, if his non-residence was known at the time the appointment was

vidual name, without authority of court, is sufficient in Maryland to justify an executor's removal: *Levering v. Levering*, 64 Md. 399, 412.

¹ *Newcomb v. Williams*, 9 Met. (Mass.) 525; *Emerson v. Bowers*, 14 Barb. 658.

² *Lucich v. Medin*, 3 Nev. 93; *Travis v. Insley*, 28 La. An. 784; *Fernbacher v. Fernbacher*, 4 Dem. 227, 243; s. c. 17 Abb. N. C. 339; *Gray v. Gray*, 39 N. J. Eq. 332.

³ *Rogers v. Morrison*, 21 La. An. 455; *Reynolds v. Zink*, 27 Gratt. 29.

⁴ *Andrews v. Tucker*, on the ground that creditors have a right to try the question of fraudulent conveyance: 7 Pick. 250; *Minor v. Mead*, 3 Conn. 289.

⁵ But not when the estate has no funds available for such purpose: *Holladay's Estate*, 18 Oreg. 168, 170; *Glines v. Weeks*, 137 Mass. 547, 550.

⁶ *Oglesby v. Howard*, 43 Ala. 144; *Williams v. Tobias*, 37 Ind. 345; *Estate of Brophy*, 12 Phila. 18; *Hubbard v. Smith*, 45 Ala. 516 (if the omission was wilful); *Matter of West*, 40 Hun, 291; *McFadden v. Ross*, 93 Ind. 134; *Holladay's Estate*, *supra*.

⁷ *Marsh v. The People*, 15 Ill. 284, 287; *Chew v. Chew*, 3 Grant Cas. 289; *Wildridge v. Patterson*, 15 Mass. 148.

⁸ *Wright v. McNatt*, 49 Tex. 425, 429; *Carey v. Reed*, 82 Md. 383, 394.

⁹ *Foltz v. Prouse*, 17 Ill. 487.

¹⁰ *Fleet v. Simmons*, 3 Dem. 542.

¹¹ *Owens v. Link*, 48 Mo. App. 534.

¹² *Taylor v. Biddle*, 71 N. C. 1; *Armstrong v. Stowe*, 77 N. C. 360; *Brown v. Ventress*, 24 La. An. 187; *Colliers v. Hollier*, 13 La. An. 585.

¹³ *Succession of Winn*, 27 La. An. 687; *Hall v. Monroe*, 27 Tex. 700; *Succession of Vogel*, 20 La. An. 81; *Crawford v. Tyson*, 46 Ala. 299; *Harris v. Dillard*, 31 Ala. 191; *Yerkes v. Broom*, 10 La. An. 94; *Frick's Appeal*, 114 Pa. St. 29, 34; *Trumble v. Williams*, 18 Neb. 144. But in Louisiana the absence of an executor or administrator is no cause for removal unless the estate shall thereby suffer: *Succession of McDonough*, 7 La. An. 472; and the *onus* to prove this is on the party moving the revocation: *Scott v. Lawson*, 10 La. An. 547. In Texas the court may temporarily suspend the authority of an executor on account of his absence, and appoint a receiver: *Long v. Wortham*, 4 Tex. 381. In Missouri, non-residence of an executor or administrator disqualifies him; but there must be an order of court declaring his removal on that ground: *State v. Rucker*, 59 Mo. 17. So in Arkansas the removal of an executor from the State does not *per se* vacate the letters: *Haynes v. Semmes*, 39 Ark. 399.

¹⁴ *Walker v. Torrance*, 12 Ga. 604; *Brown v. Strickland*, 28 Ga. 387.

made,¹ and * in Wisconsin it is held to be discretionary with [* 577] the probate court to remove or not on the ground of non-residence.² The marriage of an administratrix, in the absence of statutory provision to the contrary, is a revocation of her authority.³ The duty to revoke follows self-evidently from the refusal or neglect of an executor or administrator to give the bond required by the court;⁴ but even in this case notice and opportunity to furnish the surety should be given.⁵ Where an executor joined the Confederate army and left the Federal lines, he was held to have forfeited his trust;⁶ and in Arkansas it was held that the probate court properly appointed an administratrix in place of one who became a soldier, and was therefore unable to give proper attention to the estate, thereby impliedly revoking his authority.⁷ Acrimonious and hostile feelings between the executor and the testator's widow, and between him and a legatee, intercepting efficient and prudent management of the estate, has been held sufficient cause for removal;⁸ and so the refusal of an executor to permit his co-executors to inspect and examine the papers belonging to the estate,⁹ or an attempt by false representations and suggestions to buy the interest of a residuary legatee for an inconsiderable sum.¹⁰

§ 271. **What deemed Insufficient to justify Revocation.** — The cases negating the propriety of revocation under the circumstances in evidence therein are at least fully as instructive as Causes deemed insufficient to authorize removal. those already mentioned. So it is held that, before a creditor can have the administratrix of a succession removed, he must allege and show that he has been injured by the maladministration complained of,¹¹ and the court has no authority to remove one upon the complaint of his *co-executor [* 578]

¹ *A fortiori*, if the motion comes from one who has been sued for a debt to the testator by the executor: *Wiley v. Brainard*, 11 Vt. 107.

² *Cutler v. Howard*, 9 Wisc. 309.

³ *Kavanaugh v. Thompson*, 16 Ala. 817; *Duhne v. Young*, 3 Bush, 343; *Teschemacher v. Thompson*, 18 Cal. 11, 20. But see *Hamilton v. Levy*, 41 S. C. 374. It is held in California that marriage does not deprive her *eo instanti* of her powers, but renders her incompetent, so that she may be proceeded against for suspension and removal: *Cosgrove v. Pitman*, 103 Cal. 268, 276. See *ante*, § 232, as to the effect of coverture upon executrices, and a list of the States, in which coverture disqualifies.

⁴ *Succession of De Flechier*, 1 La. An. 20; *Davenport v. Irvine*, 4 J. J. Marsh. 60; *In re Brinson*, 73 N. C. 278; *Bills v.*

Scott, 49 Tex. 430; *Cohen's Appeal*, 2 Watts, 175; *Garrison v. Cox*, 95 N. C. 353; *Clark v. Niles*, 42 Miss. 460.

⁵ See authorities under § 269, *ante*.

⁶ *Hébert v. Jackson*, 28 La. An. 377.

⁷ *English, C. J.*, in rendering the opinion, says, "Non-management, by absence as a soldier on duty in the field remote from the estate, might be as disastrous as mismanagement. . . . It would have been more regular to revoke his letters directly in the order appointing her, but his letters were by implication revoked": *Berry v. Bellows*, 30 Ark. 198, 207.

⁸ *Estate of Pike*, 45 Wisc. 391.

⁹ *Chew's Estate*, 2 Parsons, 153.

¹⁰ *Lett v. Emmett*, 37 N. J. Eq. 535. And see *Woerner on Guardianship*, § 36, for causes justifying the removal of a guardian.

¹¹ *Succession of Decuir*, 23 La. An. 166.

who is not injured;¹ nor should an executor be removed upon a ground rendering him unsuitable, which existed and was known at the time of his appointment, without proof that this ground continued to exist.² Failure to make settlement is a cause for removal; but where the heirs divided the whole estate among themselves, there being no debts, this was held a good administration, and that the failure to make returns where there was no occasion for them was not a sufficient cause for revocation;³ nor where there is a mere omission, without citation, where the proof shows no neglect or wilful default;⁴ nor does the failure to file an inventory within the time limited,⁵ or to file accounts, constitute a forfeiture to the right of administration *ipso facto*, but must be judicially declared.⁶ The refusal to account for moneys which the executors received from the testatrix more than twenty years before her death, and the fact that almost the whole of her estate consists of debts due from the executors, are not sufficient causes for their removal as unsuitable to the trust.⁷ In New Jersey it was decided that a court of equity has jurisdiction to restrain an executor who abuses his trust from further interfering with the estate; but it is not sufficient to charge, in general terms, an abuse; the facts showing the abuse must be stated; and the fact that ten years have elapsed since the death of the testator, and that the executor has not settled his account in the Orphan's Court, is not sufficient, nor the additional fact that he has failed in business, and that three years before the filing of the bill he was discharged in bankruptcy.⁸ Bankruptcy and insolvency may be good cause for the removal of an administrator, although it does not *ipso facto* impair his official authority;⁹ but poverty is not,¹⁰ [* 579] unless the condition of the appointee has * subsequently become changed.¹¹ An administrator should not be removed on the mere ground that he can neither read nor write, nor because he

¹ Dowdy v. Graham, 42 Miss. 451, 458; remove him: Hanifan v. Needles, 108 Ill. Pattin's Estate, 7 Mackey, 392, 405. 403, 411 (two judges dissenting).

² Lehr v. Tarball, 2 How. (Miss.) 905; Drake v. Green, 10 Allen, 124, holding, also, that the existence of such ground at the time of the appointment constituted no defence to the revocation, if it continued to exist.

³ Harris v. Seals, 29 Ga. 585.

⁴ Dowdy v. Graham, *supra*; Succession of Head, 28 La. An. 800. In Illinois it is held that, on refusal to make settlement, the next step is an attachment for contempt, and if, when brought before the court, he still refuses to make settlement, the court is then required to deal with him *as for contempt*, and for this cause

⁵ *In re Graber*, 111 Cal. 432.

⁶ McClelland v. Bideman, 5 La. An. 563.

⁷ Hussey v. Coffin, 1 Allen, 354; Winship v. Bass, 12 Mass. 199.

⁸ Cooper v. Cooper, 5 N. J. Eq. 9.

⁹ Edwards's Estate, 12 Phila. 85; Loxley's Estate, 14 Phila. 317; Dwight v. Simon, 4 La. An. 490; McFadgen v. Council, 81 N. C. 195; Shields v. Shields, 60 Barb. 56.

¹⁰ Shields v. Shields, *supra*; Freeman v. Kellogg, 4 Redf. 218, 224; Postley v. Cheyne, 4 Dem. 492.

¹¹ Wilkins v. Harriss, 1 Wins. (N. C.) Eq. No. 2, 41.

has a slight knowledge of the English language,¹ if he performs his duties properly.² It is the duty of administrators to contest doubtful claims against the estate, and one is not therefore liable to be removed for reasonable delay in the administration caused by the discharge of this duty.³ Errors of judgment not amounting to malfeasance are not ground for removal.⁴ Where an administrator is appointed in place of one having priority under the statute, but who fails to give the bond or to apply within the limited time allowed him, the former cannot be removed to make place for the latter, because he is subsequently able to give the bond,⁵ or makes the application.⁶ In Louisiana, executors and administrators are required to deposit the funds of the estate in the manner pointed out by statute; but the failure to deposit a sum but slightly greater than the amount of the cost of administration is not a sufficient ground for removal.⁷ A trustee is not, at common law and under the law in most of the States, permitted to acquire property by purchase at the trustee sale; but such a purchase is not in itself proof of waste or mismanagement, and hence not a ground for the removal of an executor.⁸ The court will not remove an administrator regularly appointed, upon the suggestion of a party who was privy to the appointment, that the administrator is indebted to the estate, which is denied by the administrator; the proper remedy is to surcharge the administrator's account in the Orphan's Court;⁹ but where an administrator has an adverse personal interest in an action against himself as administrator, and made no defence to the same, he should be removed upon proof of the existence of a *defence, or of [* 580] the *bona fide* belief of its existence on the part of the distributees;¹⁰ so where there is a direct conflict of interest between the administrator and the estate.¹¹ In New York it was held that an executor's letters would not be revoked at his own request, on the ground that he has interests as surviving partner of the deceased,

¹ Hassey v. Keller, 1 Dem. 577; Gregg v. Wilson, 24 Ind. 227.

² Estate of Pacheco, 23 Cal. 476; Gregg v. Wilson, 24 Ind. 227. "As a general rule, however," says Frazer, J., "it might be better if those wholly uneducated were not appointed to such positions of trust and responsibility."

³ Andrews v. Carr, 2 R. I. 117, holding that a delay of five months to petition for a new trial on a judgment obtained against the estate was not unreasonable.

⁴ Succession of Sparrow, 39 La. An. 696.

⁵ Williams's Case, 18 Abb. Pr. 350.

⁶ Jenkins v. Sapp, 3 Jones L. 510; Cole v. Dial, 12 Tex. 100; Mayes v. Hous-

ton, 61 Tex. 690; and this although the letters were granted prematurely, if the party entitled had not applied within the time allowed: Sowell v. Sowell, 41 Ala. 359; Markland v. Albes, 81 Ala. 433.

⁷ Peale v. White, 7 La. An. 449.

⁸ Webb v. Dietrich, 7 Watts & S. 401.

⁹ Maloney's Estate, 5 Pa. Law J. R. 139.

¹⁰ Simpson v. Jones, 82 N. C. 323. See, however, Murray v. Anzell, 16 R. I. 692, holding that such cause of unsuitableness must exist at the time of the removal.

¹¹ Mill's Estate, 22 Oreg. 210. See, in connection herewith, *ante*, § 269, p. * 573.

antagonistic to his duties as executor;¹ it is no ground for removal of an executor that the will was contested subsequently to his appointment,² nor that he fails to sell land, although the direction in the will is imperative, where the time of selling is left to his discretion.³ And so, although the payment by an administrator of his own debt out of the estate is a breach of trust, for which he may be removed, yet if the interest of those concerned has not been imperilled by the amount used, the sum being small in comparison with the funds remaining in his hands, and no improper or dishonest motives can be imputed to him, he should not be removed.⁴ So payment of money by him under a forged order of court, no negligence being disclosed under the circumstances, is not sufficient.⁵ "An executor may commit errors in his accounts, or make mistakes in his construction of the will; these the court will correct, but will not remove the executor, unless there is wilful misconduct, waste, or improper disposition of the assets."⁶

§ 272. **Who may move for Revocation.** — Courts will not permit one who has no direct interest in the estate or who cannot be benefited by the order which he prays for, to prosecute for the removal of an executor or administrator. Hence it is required that in the petition or motion the interest of the party presenting it shall be stated, and wherein it has been or is about to be affected by the party to be removed. And it is not sufficient to charge mismanagement, misapplication of funds, or maladministration in general terms, but the facts must be stated which constitute the alleged cause for removal, and must be supported by affidavit.⁷ Nor will a motion for removal be heard in a collateral proceeding, but only by direct action,⁸ upon petition and citation,⁹ the service of which is a jurisdictional fact, and [* 581] * must affirmatively appear from the record to give validity to the order of removal.¹⁰ Having appeared, however, he cannot subsequently object that he had no notice.¹¹ The motion may be made by a creditor for the removal of an administrator who was appointed in contravention of

Parties having no interest cannot demand the removal of an executor or administrator.

Nor can one be removed in a collateral proceeding.

Who may demand the removal.

¹ Because the Surrogate's Court has ample jurisdiction to adjust equities: *Becker v. Lawton*, 4 Dem. 341.

² *Elwell v. Universalist Church*, 63 Tex. 220.

³ If he acts *bona fide*: *Haight v. Brishin*, 96 N. Y. 132.

⁴ *Killam v. Costley*, 52 Ala. 85.

⁵ *In re Welch*, 86 Cal. 179.

⁶ *Aldrich, J.*, in *Witherspoon v. Watts*, 18 S. C. 396, 422, citing *Stairly v. Rabe*, McMull. Eq. 22. To similar effect, *Car-*

penter v. Gray, 32 N. J. Eq. 692; *McFadgen v. Council*, 81 N. C. 195.

⁷ *Neighbors v. Hamlin*, 78 N. C. 42; *Vail v. Givan*, 55 Ind. 59; *Succession of Calhoun*, 28 La. An. 323; *White v. Spaulding*, 50 Mich. 22.

⁸ *Succession of Boyd*, 12 La. An. 611.

⁹ *Succession of Williams*, 22 La. An. 94.

¹⁰ *People v. Hartman*, 2 Sweeny, 576, 579.

¹¹ *Ferris v. Ferris*, 89 Ill. 452.

the creditors' right within the time during which they have priority over strangers,¹ or when he has been injured by the mal-administration alleged;² by the widow of the decedent;³ by a legatee under a will, when the judgment declaring it null has been appealed from;⁴ by the assignee of a devisee or legatee;⁵ by sureties conceiving themselves in danger from the conduct of the administrator;⁶ and, *a fortiori*, by any of the heirs of a solvent estate.⁷ So a railroad company, against whom the administrator has brought an action for negligence causing the death of the intestate, may test the validity of the administrator's appointment, because a judgment obtained upon the action brought would not constitute a bar to a further suit on the same cause of action if the appointment were void,⁸ but not where the appointment is only voidable.⁹ But only next of kin may contest the appointment of an administrator on the ground that he is not next of kin;¹⁰ and where a stranger and a next of kin applied contemporaneously for letters, and the stranger was appointed upon the withdrawal of the application by the next of kin, he has no right to ask for the removal subsequently.¹¹ One not of the next of kin has no right to ask for the removal of the authority of the public administrator.¹² One whose appointment as administrator is void because an administrator had already been appointed by a court whose appointment was voidable but * not [* 582] void, has no such interest in the estate as to enable him to move for revocation of the voidable appointment.¹³ An illegitimate child has no right to ask for the removal of his mother as administratrix on the ground that she was not lawfully married to the intestate, because he would have no right to administer.¹⁴ Where a non-resident is disqualified, he is incompetent to petition for the revocation of letters granted to others.¹⁵ The creditor of an executrix, but not of the testator, has no interest in the estate.¹⁶ If the application for the removal is on the ground of premature appoint-

¹ Ward v. Cameron, 37 Ala. 691.

² Succession of Decuir, 23 La. An. 166.

³ Evans v. Buchanan, 15 Ind. 438.

⁴ Newhouse v. Gale, 1 Redf. 217.

⁵ Yeaw v. Searle, 2 R. I. 164; Susz v. Forst, 4 Dem. 346.

⁶ De Lane's Case, 2 Brev. 167; Hardaway v. Parham, 27 Miss. 103. And see, as to the right of sureties to be relieved, *ante*, § 255.

⁷ Reed v. Crocker, 12 La. An. 445.

⁸ Jeffersonville R. R. Co. v. Swayne, 26 Ind. 477; Mallory v. R. R., 53 Kans. 557. To same effect, Donaldson v. Lewis, 7 Mo. App. 403.

⁹ Since payment to the *de facto* ad-

ministrator will protect: Chicago, B. & Q. R. R. v. Gould, 64 Iowa, 343.

¹⁰ Edmundson v. Roberts, 1 How. (Miss.) 322.

¹¹ Having renounced his right by implication: Cole v. Dial, 12 Tex. 100.

¹² Estate of Carr, 25 Cal. 585. Nor has the public administrator authority to provoke the removal of an executor or administrator: Succession of Burnside, 34 La. An. 728; Tittman v. Edwards, 27 Mo. App. 492.

¹³ Coltart v. Allen, 40 Ala. 155.

¹⁴ Myatt v. Myatt, 44 Ill. 473.

¹⁵ Frick's Appeal, 114 Pa. St. 29.

¹⁶ Carroll v. Iluie, 21 La. An. 561.

ment, it must be made within such time after the party in priority learns of the appointment as the statute gives him originally after the death of the intestate.¹ The judgment of the probate court granting letters testamentary cannot be collaterally assailed by a motion to remove the executor on the ground that he was not named in the will.² An application, made in proper time, for the removal of an administrator appointed upon the widow's relinquishment within the time allowed to the widow to qualify, is not waived by a subsequent application for the removal of the widow, who was appointed upon the resignation of the administrator first appointed.³

It seems that any person interested in the estate may prosecute for the removal of an executor or administrator, independently of other parties having a like interest, unless the court should require such other parties to be brought in.⁴

§ 273. **Resignation of Executors and Administrators.** — At the common law, any act of intermeddling with the effects of an estate by the person nominated as executor bound him as an acceptance of the executorship, and he could not subsequently renounce his character as executor,⁵ nor resign the trust.⁶ So with regard to the office of administrator; the probate court has no power to accept the resignation of an administrator once duly appointed and qualified, without statutory authorization.⁷ It was so held in

Executor not allowed to resign at common law.

Nor an administrator.

[*583] *Wisconsin⁸ before the authority was given by statute.⁹ In Illinois,¹⁰ Nebraska,¹¹ and North Carolina,¹² it was held, that, while there was no law allowing an administrator to resign, yet the acceptance of his resignation by the probate court amounts to a revocation of his authority; and in Minnesota it is said that a resigna-

¹ Edwards v. Bruce, 8 Md. 387.

² Grant v. Spann, 34 Miss. 294.

³ Curtis v. Burt, 34 Ala. 729.

⁴ Estate of Pike, 45 Wis. 391.

⁵ Sears v. Dillingham, 12 Mass. 358, with a citation of English authorities; ante, § 234.

⁶ Mitchell v. Adams, 1 Ired. L. 298; Haigood v. Wells, 1 Hill, Ch. 59, 61; Washington v. Blount, 8 Ired. Eq. 253, 256; *In re* Mussault, T. U. P. Charlt. 259; Driver v. Riddle, 8 Port. 343; Thomason v. Blackwell, 5 St. & P. 181.

⁷ Flinn v. Chase, 4 Denio, 85, 90. In the case of Comstock v. Crawford, 3 Wall. 396, 404, Mr. Justice Field says: "The power to accept the resignation and make the second appointment, under the circumstances of this case, were necessary incidents of the power to grant letters of administration in the first instance;" the

circumstances alluded to being that the first administrator never took possession of the effects, nor attempted to exercise any control over them, and informed the probate court that he could not act. This case would not seem, therefore, to go to the extent of establishing the power of a probate court to accept the resignation of an administrator appointed and qualified, and who had entered upon the discharge of his duties, without statutory authority to that end.

⁸ Sitzman v. Pacquette, 13 Wis. 291.

⁹ At least by implication: Rev. St. 1878, § 3804. This section is retained in Saub. & Berryman. St. 1889, § 3804.

¹⁰ Marsh v. The People, 15 Ill. 284, 286.

¹¹ Trumble v. Williams, 18 Neb. 144, 148.

¹² Tulburt v. Hollar, 102 N. C. 406, 409.

tion tendered might be a good ground for removal, and, if accepted by the court and entered in the form of an order in the record, might be taken to have the effect of a removal.¹

The reservations against the validity of the resignation of executors and administrators will be found, in most of the cases above cited, to be directed against a liability incurred, generally to account, etc.; for it would be absurd to permit one who has wasted or converted the estate, or in any way made himself liable to creditors, legatees, or distributees, to escape responsibility by resignation,² or by declaring his possession that of a legatee, and not of the executor.³ It is now generally provided by statute But is allowed by statute in most States. in the several States, that for reasons deemed sufficient by the probate court it may accept the resignation of an executor or administrator, and relieve him, after settlement of his account, from the trust.⁴ It was held in Illinois⁵ and in Massachusetts, in the absence of a statute authorizing resignation, that, where the interest of the estate collided with * that of the executor, [* 584] the acceptance of the resignation of the latter by the probate court constitutes an order of removal on the ground of "unsuitableness."⁶ So in Missouri the duty of the administrator of two estates, one of which it was contended was indebted to the other, to resign one of them, was indicated by the Supreme Court.⁷ In Alabama, it was ruled that, where an administrator accepted the office of probate judge, he did not thereby vacate his office as administrator;⁸ but

¹ Rumrill v. First National Bank, 28 Minn. 202; followed in Balch v. Hooper, 32 Minn. 158.

² It was held in California that the statute allowing an administrator to resign after settling his accounts excluded his right to do so without having settled: Haynes v. Meeks, 10 Cal. 110. So in Driver v. Riddle, *supra*, the statute of Alabama is alluded to as granting the right to resign, expressly providing, however, the continuing liability of the administrator and his sureties for any assets not duly accounted for. To same effect, Coleman v. Raynor, 3 Coldw. 25, 29; where the resignation is accepted pending the settlement of his accounts, the court may nevertheless settle his accounts, and hear and determine exceptions thereto, and ascertain the amount due from him, as if he had not resigned: Slagle v. Entrekkin, 44 Oh. St. 637, 639. And see authorities cited *post*, § 274, p. * 589.

³ Bird v. Jones, 5 La. An. 643, 645.

⁴ Schoul. Ex. § 156.

⁵ Marsh v. The People, *supra*.

⁶ Where, for instance, the executor shows that the prosecution of his personal claims against the estate conflict with his duties as executor: Thayer v. Homer, 11 Met. (Mass.) 104.

⁷ State v. Bidlingmaier, 26 Mo. 483, affirmed in 31 Mo. 95.

⁸ Whitworth v. Oliver, 39 Ala. 286, 290. The question arose in a suit against the administrator's sureties, and for the furtherance of justice in that case it may not have been necessary to appoint an administrator *de bonis non*. But for the ordinary purposes of administration the election of an administrator to the office of judge of probate with jurisdiction over the estate administered by him, seems to be highly suggestive of the propriety of resignation or removal as administrator. A litigant claiming adversely to the *administrator* would be at some disadvantage before the *judge*, who would so much more readily understand and appreciate the force of the administrator's position than that of his opponent.

the propriety of a voluntary resignation by the judge of his previous office of administrator was not questioned.

The right to resign is not, however, an absolute or arbitrary right; it can only be accorded upon proof of circumstances showing it to be consistent with the interests of the estate.¹ Hence the parties interested in the estate should have notice of the intended resignation, either by publication or otherwise. The method of notice is generally provided by statute;² and it is held in Georgia, that, if not complied with, the order granting a discharge is void;³ and so in New Jersey.⁴

§ 274. **Consequences of the Revocation of Letters.** — The effect of the revocation of letters testamentary and of administration, and of the resignation of the executor or administrator, is [* 585] * necessarily mentioned in connection with the subject of jurisdiction of probate courts,⁵ executors *de son tort*,⁶ and of the powers and duties of administrators *de bonis non*;⁷ and on several other occasions the principle upon which the validity of the mesne acts of an executor or administrator after appointment and before revocation depends, has been discussed.⁸ It may nevertheless be of utility to add, in this connection, some considerations on this subject, although, perhaps, to some extent in recapitulation of what has been said before.

Mr. Williams, in his great treatise on Executors and Administrators, says on this subject, that the first important distinction to be considered is between grants which are void, and such as are merely voidable, — the mesne acts of an executor or administrator between the grant and its revocation

Distinction between acts of an administrator

¹ In New York it is held that an allegation that the petitioner "is too busy with her own private matters, and no longer desires to be busied" with her trust, is not a "sufficient reason" to authorize the resignation of an executrix, under the statute: *Baier v. Baier*, 4 Dem. 162. An executor, although he may resign, cannot retract a renunciation: *Matter of Suarez*, 3 Dem. 164.

² In Missouri, by publication in a newspaper for four consecutive weeks before the beginning of the term at which the application is to be made: *Rev. St.* 1889, § 43. In a collateral proceeding it is not necessary to show an express order accepting a resignation; and the publication of the requisite notice will be presumed in such a case when there is an approved settlement professing to be made "upon resignation," followed by a change of

administration, to a successor: *Macey v. Stark*, 116 Mo. 481, 503.

³ *Head v. Bridges*, 67 Ga. 227, 232, *Speer, J.*, dissenting, 239, on the ground that there was no proof in the record that there had been no service, in the absence of which the recital of service must be deemed conclusive. Also *Barnes v. Underwood*, 54 Ga. 87.

⁴ *Vail v. Male*, 37 N. J. Eq. 521, the rule of court requiring at least thirty days' notice, unless the court order otherwise.

⁵ *Ante*, ch. xvi.

⁶ Ch. xxi.

⁷ *Ante*, § 179.

⁸ See as to the validity of the administration on the estate of a person not actually dead, *ante*, §§ 208-211; also *ante*, § 266, as to the validity of acts before revocation; and *ante*, § 227, on p. * 501, as to the effect of the annulment of a will after distribution thereunder.

tor under void, being, in the former case, of no validity. The necessity of this rule is self-evident: a void grant is no grant, and acts depending for their validity upon official authority in the actor are wholly void in the absence of such authority. So far, then, as the original appointment of an executor was made by a court having no power to make such an appointment, — whether for want of jurisdiction generally or in the particular case that may be in question, — all that the person so appointed has done under color of his appointment must be treated precisely as if done by a stranger. The revocation in such case amounts simply to an official declaration of the nullity of what has been done, “for the sake of correcting the records and preventing further mischief.”¹

Mr. Williams then proceeds to cite and quote from a number of English cases, showing that many such acts were held void under circumstances which seem to make the ruling incompatible with principles of strict justice and wise policy; thus all acts performed by an administrator who obtained letters on the concealment of a will,² or by one appointed before the executor had renounced,³ or by an executor who obtained probate, knowing *that there [* 586] was a later will by the same testator,⁴ have been held void, so that the later appointed executor or administrator was allowed to maintain trover or detinue to recover property from one who had purchased of the former appointee.⁵ The justice and wisdom of this principle would seem to be limited to such persons as acted with knowledge or notice of the invalidity of the authority of the executor or administrator. But to visit upon one who has no means of detecting it the consequences of a fraud practised upon the court granting letters, or of a mistake in the effect of the evidence produced before it, and who relies upon the validity of the unreversed decrees and judgments of a court created by the law for the purpose of rendering them, seems a mockery of justice and the perversion of law into a snare. As if in melioration of the harshness, not to say injustice, of the rule applied in these cases, the privilege accorded to executors *de son tort* to recoup, in damages, payments made in due course of administration, is extended to the vendees of an executor or administrator under void letters.⁶ But this privilege does not extend to an executor knowingly acting under a void probate; in

¹ Schoul. Ex. § 160, p. 220.

² Wms. Ex. [586], citing *Abram v. Cunningham*, 2 Lev. 182; *Graysbrook v. Fox*, Plowd. 276.

³ *Abram v. Cunningham*, *supra*; *Baxter and Bale's Case*, 1 Leon. 90; and see *Throckmorton v. Hobby*, 1 Brownl. 51.

⁴ *Woolley v. Clark*, 5 B. & Ald. 744.

⁶ Or he might bring assumpsit for the proceeds, waiving the tort and treating

the sale as if made with his consent for his use: Wms. Ex. [587].

⁵ Wms. Ex. [588], citing *Graysbrook v. Fox*, *supra*, in which “it was laid down by the court that, if the sale had been made to discharge funeral expenses or debts, which the executor or administrator was compellable to pay, the sale would have been indefeasible forever.”

the case of *Woolley v. Clark*,¹ such an executor was not allowed to give evidence of the administration of assets. In this case, the distinction is broadly drawn between one who acts with knowledge or notice of the defect in the authority, and one who has no such notice: "Where a party obtains a judgment irregularly, which is afterward set aside for irregularity, he is not justified in acting under it; but the sheriff is justified." And this view seems to be recognized in many English cases, even in that in which Justices Ashhurst and Buller uttered the *dictum*, that the case of a probate of a supposed will during the life of a party may be distinguished

from a case where a party acts under the authority of a court [*587] of law. "Every person is bound to pay *deference to a judicial act of a court having competent jurisdiction," says Justice Ashhurst.² And Justice Buller: "I am most clearly of opinion that it [probate of a will] is a judicial act; for the ecclesiastical court may hear and examine the parties on the different sides whether a will be or be not properly made; that is the only court that can pronounce whether or not the will be good. And the courts of common law have no jurisdiction over the subject. Secondly, *The probate is conclusive till it be repealed*; and no court of common law can admit evidence to impeach it."³ It was held early in the reign of Queen Elizabeth, that a sale or gift by an administrator, whose authority was subsequently vacated, stood unaffected thereby.⁴

The cases giving rise to the application of this principle in America turn mostly upon the question of the residence of the decedent at the time of his death; for it was formerly held in many States, that the probate court has no jurisdiction to grant probate or letters unless the decedent died an inhabitant of the county, or leaving property therein, and that letters granted where such was not the fact, and all acts done upon the authority thereof, are void. This doctrine is now very generally giving way to the safer one of holding them voidable, but good until revoked.⁵

So, also, the discovery of a will will not make void letters of administration granted generally; but until revoked all persons acting in good faith with the administrator will be protected.⁶

If the grant is only voidable, another distinction is taken between a proceeding by citation to revoke the letters granted, and an appeal

¹ 5 B. & Ald. 744.

² *Allen v. Dundas*, 3 T. R. 125, 129.

³ *Ib.*, pp. 130, 131, citing *Kerrick v. Bransby*, 2 Eq. Cas. Abr. 421, pl. 4.

⁴ "Forasmuch as the first administrator had the absolute property of the goods in him, he might give them to whom he pleased. And although the letters of administration be afterwards countermanded and revoked, yet that cannot defeat the

gift. But if the gift be by covin, it shall be void by the statute": *Packman's Case*, 6 Co. 19. To the same effect, *Semine v. Semine*, 2 Lev. 90.

⁵ See *ante*, § 204.

⁶ *Ante*, § 266; *Schluter v. Bowery Bank*, 117 N. Y. 125; *Franklin v. Franklin*, 91 Tenn. 119; see also *Smith v. Smith*, 168 Ill. 488, 496.

Distinction between citation to revoke a voidable grant, and appeal from judgment granting letters.

from the judgment of the court of probate, which is taken to reverse a former sentence.¹ The appeal suspends, until its termination, the powers of the person against whose appointment it is taken, and all of his intermediate acts are ineffectual. If anything is necessary to be done for the estate during the prosecution * of the appeal, it is within the power of [* 588]

the probate court to appoint an administrator *pendente lite*.² The bond of an executor is not vacated, but only suspended, by the appeal from the order appointing him.³ Where an order of revocation is appealed from, it is held in some States that the appeal suspends the order of revocation, and leaves the letters in full force and effect;⁴ while elsewhere the authority of the executor pending the appeal is denied.⁵ But on an appeal from the order granting letters, such letters cannot be granted pending the appeal.⁶

A revocation upon citation, where the grant of letters was voidable only, leaves all lawful acts done by the first administrator valid and binding, as though his authority had not been questioned; all sales of real or personal property made lawfully by the executor or administrator, and with good faith on the part of the purchaser, are and shall remain valid and effectual, and the payment to him of a debt to the estate will be a legal discharge to the debtor. This is self-evident, and it would be a waste of time and space to examine the very numerous cases so holding.⁷ Beside the cases bearing upon this subject which are cited *ante*, in connection with the several subjects mentioned in the opening of this section, there will be occasion to cite others, in connection with the relation which several executors or administrators of the same estate bear to each other, which also touch upon the effect of revocation and resignation.

It may be mentioned, however, that since the removed executor or administrator has no further authority to act, or bind the estate, he cannot be held liable for any act affecting the estate after his removal.⁸ To a suit pending against him at the time of his removal he may plead the revocation of his authority in bar,⁹ at least if he

¹ Wms. Ex. [588].

² Fletcher v. Fletcher, 29 Vt. 98, 102; Arnold v. Sabin, 4 Cush. 46. And see *In re Moore*, 86 Cal. 72.

³ Hence, if the original grant is affirmed on appeal, no new bond need be given by the executor: Dunham v. Dunham, 16 Gray, 577.

⁴ So in Maryland: State v. Williams, 9 Gill, 172; Mississippi: Muirhead v. Muirhead, 8 Sm. & M. 211; Pennsylvania: Shaufler v. Stoeve, 4 S. & R. 202. See also *post*, § 547.

⁵ So in Georgia: Thompson v. Knight, 23 Ga. 399; Louisiana: Succession of Townsend, 37 La. An. 408.

⁶ State v. Williams, *supra*; Offutt v. Gott, 12 Gill & J. 385. See as to the effect of an appeal, *post*, §§ 547 *et seq*.

⁷ Schluter v. Bowery Bank, 117 N. Y. 125, 130; Franklin v. Franklin, 91 Tenn. 119; see *ante*, § 266, and cases cited.

⁸ Marsh v. The People, 15 Ill. 284.

⁹ Morrison v. Cones, 7 Blackf. 593; Broach v. Walker, 2 Ga. 428; Hall v. Pearman, 20 Tex. 168.

has settled his account;¹ and such suit must be further [* 589] * prosecuted in the name of a new representative of the estate, or be dismissed.² Hence a decree for the sale of lands to pay debts, on application of the decedent's creditors, is void, if the administrator's resignation has been accepted before the rendition of the decree.³ After revocation, removal, or resignation, the former executor or administrator cannot complete a sale which he has been negotiating on behalf of the estate,⁴ nor collect assets;⁵ but the court has jurisdiction to settle his accounts as though he were still in office.⁶

It is held in New York that an executor, whose letters have been revoked on the ground of having been adjudged a lunatic, is not entitled to rehabilitation in office on judicial restoration to sanity. The principle involved extends equally to removals for any cause.⁷

Cessation of cause of revocation does not rehabilitate the person removed.

¹ *Cogburn v. McQueen*, 46 Ala. 551, 565.

⁵ *Stubblefield v. McRaven*, 5 Sm. & M. 130, 133.

² *Per Bell, J.*, in *Wiggin v. Plumer*, 31 N. H. 251, 266; *National Bank v. Stanton*, 116 Mass. 435; *Brown v. Pendergast*, 7 Allen, 427.

⁶ *Casoni v. Jerome*, 58 N. Y. 315, 322; *Nevit v. Woodburn*, 160 Ill. 203, 213; *Slagle v. Entrekin*, 44 Oh. St. 637, 639; *In re Hood*, 104 N. Y. 103; *In re Radowich*, 74 Cal. 536; and see authorities *ante*, § 273, p. * 583.

³ *Wright v. Thornton*, 87 Tenn. 74.

⁴ *Owens v. Cowen*, 7 B. Mon. 152, 157; *Bender v. Bean*, 52 Ark. 132, 143. *Post*, § 474.

⁷ *Matter of Deering*, 4 Dem. 81.

OF THE PROPERTY TO WHICH THE TITLE OF EXECUTORS AND ADMINISTRATORS EXTENDS.

THERE is no occasion to repeat citation of authorities on the proposition, that, at common law and in all the States, all mere personal property, including chattels real, goes to the executor of a testator, and to the administrator of an intestate, or of a testator in case no executor accepts or qualifies. The single exception that may be mentioned is, that by special custom heirlooms go to the heir or devisee, and although they are mere chattels, cannot be devised apart from the realty.¹

Heirlooms in the strict sense are said to be rare,² and seem not to be recognized in America;³ they are, according to the ancient authorities, such goods and chattels as, though not in their nature heritable, have a heritable character impressed upon them,⁴ although Blackstone describes them as generally being such things as cannot be taken away without damaging or dismembering the freehold.⁵ This subject is not of sufficient importance to justify further consideration here; the law as to the cognate subject of fixtures not severable from the inheritance will be treated hereinafter.⁶

Family portraits specifically bequeathed have been held to constitute no part of the testator's personal estate, and that therefore the administrator *cum testamento annexo* has no right to them.⁷ So an administrator has no property in the cadaver of his intestate, and cannot [* 591] maintain an action for its wilful and negligent mutilation; but may sue for injury to the wearing apparel of the deceased.⁸ In a case arising in Rhode Island,⁹ Potter, J., reviews the Roman, canon, and ecclesiastical law, and reaches the conclusion,

¹ 2 Blackst. * 429; 1 Schouler on Personal Property, 118.

² Rap. & L. Law Diet. "Heirlooms."

³ 1 Washb. R. Prop. ch. 1, pl. 16.

⁴ Byng v. Byng, 10 H. L. Cas. 171, 183. See authorities in Wms. Ex. [721].

⁵ 2 Blackst. * 427. The crown jewels

of England are mentioned as being heirlooms descendible to the next successor. Wms. Ex. [722].

⁶ Post, §§ 280 et seq.

⁷ Estate of Mosely, 12 Phila. 50.

⁸ Griffith v. Railroad, 23 S. C. 25.

⁹ Pierce v. Proprietors, 10 R. I. 227.

that, while a dead body is not property in the strict sense of the common law, yet the relatives have rights over it which courts will protect.¹ So in Minnesota this right of the widow or next of kin is fully maintained, and it is held that for any infraction thereof — such as an unlawful mutilation of the remains — a recovery may be had for the injury to the feelings and mental suffering resulting proximately from the wrongful act, though no actual pecuniary damage is done.² In Indiana the proposition is announced, that the bodies of the dead belong to the surviving relations as property,³ and that they, and not the administrator, have the right to the custody and burial of the same.⁴ So in Pennsylvania.⁵

¹ *Ib.*, pp. 235, 239. See a learned dissertation on this subject in a note to the referee's report in the Matter of opening Beekman Street, by Surrogate Bradford, appended to 4 *Bradf.* p. 503.

² *Larson v. Chase*, 47 *Minn.* 307 (declaring the widow's right paramount to the next of kin). See also, as to the respective rights of widow and daughter

touching the interment and erecting of a monument: *Thompson v. Deeds*, 93 *Iowa*, 228.

³ *Bogert v. Indianapolis*, 13 *Ind.* 134, 138.

⁴ *Renihan v. Right*, 125 *Ind.* 536.

⁵ *Wynkoop v. Wynkoop*, 42 *Pa. St.* 293, 302 (excluding the right of the administratrix and wife).

* CHAPTER XXX.

[* 592]

OF PROPERTY IN POSSESSION.

§ 275. **Joint and Partnership Property.** — Since it was found most convenient to consider the law affecting the estates of deceased partners in connection with the effect produced by the death of a member of a partnership, it is not necessary to mention the subject here further than to refer to the chapter where it is treated.¹

It is one of the characteristics of joint ownership of property, personal as well as real, that, when one of the joint owners dies, his interest passes at once to the survivor or survivors, excluding the personal representatives as well as heirs and distributees from any title therein.² But in equity, the owners of a mortgage made to several mortgagees jointly were held to be owners in common of the money secured thereby, the right to which, on the death of one of them, passes to his executor or administrator.³ From this principle Mr. Williams deduces the rule that at law the right of a joint owner passes, on his death, to the survivor or survivors,⁴ but in equity to his executor or administrator.⁵

§ 276. **Real Estate.** — There will be occasion hereafter, in connection with the law regulating the liability and powers of executors and administrators in respect of real estate,⁶ as well as in treating of the sale of real estate for the payment of debts,⁷ to dwell upon the circumstances under which real estate will pass to the personal representative for administration. It will be sufficient, therefore, to mention in this connection the general rule, that in the absence of statutory provisions the real estate, or lands, tenements, and hereditaments, of a deceased person, go directly to the heirs or devisees. * Exceptions to this rule [* 593] are enacted in many States whose statutes direct that realty and personalty are alike subject to administration;⁸ in the others real estate is likewise subject to be administered in case it becomes necessary, from the lack

¹ *Ante*, §§ 123 *et seq.*

² 1 Schoul. Pers. Pr. 188.

³ *Vickers v. Cowell*, 1 Beav. 529.

⁴ *Wms. Ex.* [650].

⁵ *Wms. Ex.* [1900].

⁶ *Post*, §§ 338 *et seq.*

⁷ *Post*, §§ 463 *et seq.*

⁸ These States are enumerated, *post*, § 337.

of sufficient personalty, to pay the decedent's debts, so that in these States the realty descends to the heir or devisee subject to a naked power to be sold on the happening of the contingency named.¹ It is also to be mentioned here that executors, and under some circumstances administrators *cum testamento annexo*, are sometimes vested by will with power to dispose of real estate. In this respect it is sometimes difficult to decide whether the devise is to the executor, or to the devisee with a naked power in the executor. Judge McCreary has adopted, on this point, the rule as laid down by Judge Redfield:² "It is said the devise of the land to the executors to sell passes the title; but a devise that executors may sell or shall sell lands, or that they may or shall be sold by the executors, gives them only a naked power of sale."³ The power to sell may be granted by implication,⁴ where, and to the extent to which it is necessary to carry out the testator's intention,⁵ but will not be implied from the mere fact that lands are charged with the payment of debts,⁶ or that distribution is to be made after the executor's death,⁷ or that he is directed to "divide" it.⁸

or under a power to the executor by will.

Devise to sell passes the title;

but the mere direction or authorizing of a sale confers a naked power.

Power to sell may be granted by implication,

Real estate directed by the testator to be unconditionally sold by his executor is by the doctrine of equitable conversion deemed to be converted into personalty from the moment of the testator's death, and the proceeds are assets in the executor's hands;⁹ so if the deceased in his lifetime contracts for the sale of real estate held by him, it is considered in equity a conversion of the land into money, the vendor's interest ceases to be real estate, becoming a chose in action which goes to his personal representative, and the legal title is held only as a security for the payment of the debt.¹⁰

¹ This subject is fully discussed, *post*, §§ 463 *et seq.*

² 3 Redf. on Wills, 137, pl. 2, note (1), citing Sugd. on Powers, 8th ed. 112, an authority also cited by Williams, Ex. [654], who reaches the same conclusion.

³ Beadle v. Beadle, 2 McCrary, 586, 595. See Cohea v. Jemison, 68 Miss. 510, 517, and cases there cited. Also Simmons v. Spratt, 26 Fla. 448, 458.

⁴ *Per* Wilde, J., in Tainter v. Clark, 13 Met. (Mass.) 220, 228; Cahill v. Russell, 140 N. Y. 402. And see cases cited, §§ 339 *et seq.* on this point.

⁵ Walker v. Murphy, 34 Ala. 591, 594; Gray v. Henderson, 71 Pa. St. 368; Lindly v. O'Reilly, 50 N. J. L. 636; Cohea v. Jemison, 68 Miss. 510; Ebey v. Adams, 135 Ill. 80, 85.

⁶ *Post*, § 490, p. *1096, where this subject is discussed; Fox's Will, 52 N. Y. 530, 536; Owen v. Ellis, 64 Mo. 77.

⁷ Waller v. Logan, 5 B. Mon. 515, 522.

⁸ Gammon v. Gammon, 153 Ill. 41.

⁹ *Post*, § 342 and cases; also § 339, p. *719.

¹⁰ Bender v. Luckenbach, 162 Pa. St. 18, 22, and cases cited; Williams v. Haddock, 145 N. Y. 145 and authorities; Hyde v. Heller, 10 Wash. 586. Even where the purchaser is given an option not exercised until after the testator's death, on his election to purchase, the money goes to the legatees, and not to the devisees: Newport v. Sisson, 18 R. I. 411.

The effect of a sale of, or contract to sell, realty theretofore devised, on the rights of the devisee and personal representative, has been considered elsewhere.¹

§ 277. **Chattels Real**, which, as already remarked, go to the executor or administrator, include all leases of lands or tenements for a definite space of time, measured by years, months, or days, or until a day named;² also estates at will, by sufferance, and, generally, any estate in lands not amounting to a freehold.³ So the residue * after the death of a tenant *pur autre vie* [* 594] goes to the executor or administrator;⁴ and by analogy to the provision of the English Statute of Frauds⁵ (directing that an estate *pur autre vie* might be devised, and should be chargeable for debts on debtor's death, in the hands of the heirs of a special occupant, or of the executor or administrator if there were no occupant) the interest of an assignee of a lease for lives, although a freehold, passed on his death to his executor or administrator.⁶ Text-writers also mention the estate known as terms attendant upon the inheritance,⁷ which in equity, it is said, is regarded as being confined to the freehold, and inseparable from it.⁸

By statute in some of the States leases exceeding a given number of years, or certain other interests, which at common law would be personalty, are to be treated as real estate with reference to the rights of the administrator.⁹

§ 278. **Chattels Real of the Wife.** — It is familiar doctrine that at common law the wife's interest in her chattels real may be divested by the husband at any time during coverture. But he may permit them to remain *in statu quo*, and if in such case the wife survive, they are hers to the exclusion of his executors and administrators.¹⁰

¹ Ante, § 53.

² 2 Kent Com. * 342; *Schee v. Wiseman*, 79 Ind. 389; *Lewis v. Ringo*, 3 A. K. Marsh. 247; *Murdock v. Ratcliff*, 7 Ohio, 119; *Payne v. Harris*, 3 Strobb. Eq. 39; *Gutzweiler v. Lackmann*, 39 Mo. 91, 97; *Gay ex parte*, 5 Mass. 419; *Brewster v. Hill*, 1 N. H. 350; *Thornton v. Mehring*, 117 Ill. 55; *Becker v. Walworth*, 45 Oh. St. 169 (holding that the personal representative of the lessee becomes assignee, by virtue of his office, of the term; hence if such representative enters and receives the rents, he becomes personally liable to the lessor for accruing rents, to the extent of the profits during such occupancy); *Mulloy v. Kyle*, 26 Neb. 313.

³ Rap. & L. Law Dict., "Chattels Real;" Wms. Ex. [675].

⁴ 3 Redf. on Wills, 143 *et seq.*, pl. 4-6.

⁵ 29 Car. II. c. 3, § 12.

⁶ *Mosher v. Yost*, 33 Barb. 277, 279.

⁷ When a term is created for a particular purpose, and this purpose has been accomplished, the termor is held in equity as trustee for the owner: Wms. Ex. [1675].

⁸ 3 Redf. on Wills, 143, pl. 3; Schoul. Ex. § 221.

⁹ Such a statute is found, for instance, in Colorado: *McKee v. Howe*, 17 Colo. 538.

¹⁰ Schoul. Husb. & Wife, § 164; Wms. Ex. [690]; 3 Redf. on Wills, 146, pl. 12.

unaffected by testamentary disposition or charge.¹ The disposition by the husband, in order to divest his wife's interest in chattels real, must, as a general principle, be such as to effect a complete change of the interest held by husband and wife jointly.² Thus recovery, after ejectment, by the husband in his own name, is sufficient;³ but where the husband had taken the lease into custody, applied to an attorney to collect the rent, and the wife seemed unwilling to execute a power of attorney to prosecute in the name of both, whereupon the husband relinquished his intention, it was held that the husband had not thereby altered the title.⁴ So if the husband mortgages the wife's term and makes default in payment, by reason whereof the mortgagee's title becomes absolute, the [* 595] wife's right by survivorship is defeated; but * if the mortgagee's title is defeated by payment at maturity, her interest is not affected.⁵

He cannot divest her by will.

To divest wife's title it must be completely altered during coverture.

Power in the husband to divest the whole of his wife's estate in chattels real includes power to divest any part thereof. Hence, if he alone grants a portion of the wife's term, reserving rent, he makes himself the owner of the term so granted, and the rent reserved will go to his executor;⁶ but the residue will survive to the wife.⁷

But he may partially divest wife's title.

If the husband survive, he is entitled to his wife's chattels real not disposed of by him during coverture, and of which he had possession *jure uxoris*; not as her executor or administrator, but by right of survivorship.⁸ Hence, if he should himself die without having administered on the wife's estate, her chattels real go to his executor or administrator.⁹

If husband survive, his wife's chattels go to him in his marital right.

§ 279. **Mortgages**, as well as deeds of trust to secure the payment of debts to the decedent, always go to the executor or administrator,¹⁰ even though the estate was in process of foreclosure at the time of the testator's death¹¹ and

Mortgages go to personal representative.

¹ 1 Bish. on Mar. Women, § 188; Stew. Husb. & Wife, § 145. Both of these writers cite as authority, besides Coke (Litt. 46 b, 351 a), *Roberts v. Polgrean*, 1 H. Bl. 535; 3 Redf. on Wills, 146, pl. 13.

² Wms. Ex. [691].

³ 3 Redf. on Wills, 146, pl. 13; Brett v. Cumberland, 3 Bulst. 163, 164.

⁴ *Daniels v. Richardson*, 22 Pick. 565, 570.

⁵ Wms. Ex. [692], citing *Young v. Radford*, Hob. 3 b, which, however, turns upon a mortgage made by husband and wife, and surviving to the husband by the wife's death before the day of payment.

⁶ 3 Redf. on Wills, 146, pl. 14.

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⁷ Wms. Ex. [694], citing as authority two cases from Cro. Eliz.

⁸ 3 Redf. on Wills, 147, pl. 15.

⁹ Wms. Ex. [695]; *Roberts v. Polgrean*, 1 H. Bl. 535.

¹⁰ *Smith v. Dyer*, 16 Mass. 18; *Taft v. Stevens*, 3 Gray, 504; *Long v. O'Fallon*, 19 How. (U. S.) 116, 125; *Burton v. Hintrager*, 18 Iowa, 348; *Webster v. Calden*, 56 Me. 204, 210; *Clark v. Blackington*, 110 Mass. 369; *Ladd v. Wiggin*, 35 N. H. 421; *Shoolbred v. Drayton*, 2 Desaus. 246; *Clapp v. Beardsley*, 1 Vt. 151, 167; *Williams v. Ely*, 13 Wis. 1, 6; *Copper v. Wells*, 1 N. J. Eq. 10; *Hemenway v. Lynde*, 79 Me. 299.

¹¹ *Fay v. Cheney*, 14 Pick. 399; *Dewey*

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although the heirs obtained possession before the appointment of an administrator.¹ So, also, the real estate acquired by an executor or administrator in satisfaction of a judgment for a debt due the deceased is held by him in trust until it appears that it is not needed to pay debts or expenses of administration, when the title passes to the heirs.² The equity of redemption in the mortgagor descends to his heirs. Hence it is usually held that, while the surplus proceeds of a sale *during the lifetime of the [* 596] mortgagor constitute personal property going to the executor the surplus of a sale after his death represents real estate and goes to the heirs.³

It follows from the law giving to executors and administrators the custody of real as well as of personal estate, as is provided by statute in some States, that such surplus remaining after payment of the debt secured and expenses of sale likewise goes to the executor or administrator.⁴ And it is held in Delaware that such surplus should be paid to and held by the executor or administrator until it appear that it is not needed for the payment of debts.⁵ So in Massachusetts, the surplus proceeds of a sale under a power directing such surplus to be paid to the mortgagor or his assigns may be recovered by the mortgagor's executor, although devised to others, who holds it, first to the use of the widow, next for payment of debts, and lastly to the uses of the will.⁶ In Pennsylvania, by statute, the surplus, after payment of liens, raised by a sheriff's sale, must be paid to the personal representative, to be distributed by order of the Orphan's Court, the jurisdiction of which is exclusive.⁷ The vendor's lien for unpaid purchase-money, being a chose in action, goes to the executor or administrator, and not to the widow or heirs as such.⁸

§ 280. **Chattels Animate.** — Domestic animals, being personal property, go to the executor or administrator. Of animals *feræ naturæ* only such go to the personal representative as are confined, or in the immediate possession of man; such as tame pigeons, deer, rabbits, pheasants, partridges, etc.;

v. Van Deusen, 4 Pick. 19; *Stevenson v. Polk*, 71 Iowa, 278, 290.

¹ *Haskins v. Hawkes*, 108 Mass. 379; *Demarest v. Wynkoop*, 3 John. Ch. 129.

² *Webber v. Webber*, 6 Me. 127; *Boylston v. Carver*, 4 Mass. 598; *Gibson v. Bailey*, 9 N. H. 168. See, in connection herewith, *post*, § 307, and authorities.

³ *Cox v. McBurney*, 2 Sandf. 561, 563; *Swezey v. Willis*, 1 Bradf. 495; *Moses v. Murgatroyd*, 1 John. Ch. 119; *Bogert v. Furman*, 10 Pai. 496; *Dunning v. Ocean Bank*, 61 N. Y. 497; *Shaw v. Hoadley*, 8

Blackf. 165; *Chaffee v. Franklin*, 11 R. I. 578; *Jones on Mortg.* § 1931; see also *Garlick v. Patterson*, 2 Chev. 27. And the profits of such surplus belong to the heirs until measures are taken to subject the same to the payment of debts: *Allen v. Allen*, 12 R. I. 301.

⁴ *Butler v. Smith*, 20 Oreg. 126, 131.

⁵ *Vincent v. Platt*, 5 Harr. 164, 167.

⁶ *Varnum v. Meserve*, 8 Allen, 158.

⁷ *Weimer v. Karch*, 153 Pa. St. 385.

⁸ *Evans v. Enloe*, 70 Wis. 345, 348.

or animals kept in a room, cage, or the like; fish in a box, tank, or net;¹ doves in a dove-house;² or animals wounded so as to prevent their escape,³ or killed; or oysters artificially planted in a bed clearly separated and marked out for the purpose.⁴ But animals *feræ naturæ*, in so far as they belong to a privilege connected with landed possession, such as deer in a park (not so tame or reclaimed from

naturæ in possession.

Feræ naturæ in park, etc., go with the land.

their wild state as to become personal property), fish in a [* 597] pond, and the like, will go to the heir, if the * deceased held a freehold estate, or to the executor, as accessory to the chattel real, if he held a term for years.⁵

§ 281. **Chattels Vegetable.** — Chattels vegetable, being the fruit or other parts of a plant when severed from its body, or the plant itself when severed from the ground, go to the executor or administrator. But unless they have been severed, trees and the fruit and produce therefrom follow the nature of the soil upon which they grow, and when the owner of the land dies they descend to the heir or person entitled to the land.⁶ But even growing timber, trees, and grass special circumstances, become chattels, and as such pass to the executor or administrator; where, for instance, the owner of the fee grants the trees on land to another, they become personalty.⁷ Or the owner in fee simple may sell the land and reserve the timber or trees, and they thereby become personalty and go to the personal representative.⁸

Fruit or plants, when severed from the ground, go to the executor or administrator.

may, under

Growing timber and grass may go to the executor, under certain circumstances.

¹ *Buster v. Newkirk*, 20 John. 75; *Pierson v. Post*, 3 Cai. 175.

² *Commonwealth v. Chace*, 9 Pick. 15.

³ But simple *pursuit* is not sufficient to create ownership: *Buster v. Newkirk* and *Pierson v. Post*, *supra*.

⁴ *Fleet v. Hegeman*, 14 Wend. 42; *Decker v. Fisher*, 4 Barb. 592; *Lowndes v. Dickerson*, 34 Barb. 586.

⁵ *Ferguson v. Miller*, 1 Cow. 243, holding that a swarm of bees in a bee tree belong to the owner of the soil where the tree stands; and if he gives license to two persons successively to take them, they become the property of him who first takes possession, although the other first marked the tree. *Wms. Ex.* [704], with English and American authorities.

⁶ *Green v. Armstrong*, 1 Denio, 550, 554. Grass, clover, hay, and fruits hanging on trees go with the land: *Kain v. Fisher*, 6 N. Y. 597; *Matter of Chamberlain*, 140 N. Y. 390; *Evans v. Iglehart*, 6 G. & J. 171, 173; *Craddock v. Riddles-*

barger, 2 Dana, 205, 206; *Mitchell v. Billingsley*, 17 Ala. 391, 393; *Price v. Brayton*, 19 Iowa, 309 (distinguishing between trees planted by the owner of the realty and trees planted by a tenant for the purposes of trade); *Maples v. Milon* (drawing the same distinction, but holding it inapplicable between mortgagor and mortgagee), 31 Conn. 598, 600. See also next section in connection herewith.

⁷ *Wms. Ex.* [707]. Growing trees by a valid sale in writing by the owner of the fee in land are severed, in contemplation of law, from the land, and become chattels personal: *Warren v. Leland*, 2 Barb. 613, 618; but a mortgage of growing trees or grass by the owner of the fee of the land does not work a severance until it becomes absolute by non-performance of the condition: *Bank of Lansingburgh v. Crary*, 1 Barb. 542, 545.

⁸ 3 Redf. on Wills, 151, pl. 2, citing *Herlakenden's Case*, 4 Co. 62 a.

A distinction is also made in England, and has been recognized in America, between trees fit for timber and such as are not, — the former, when severed by the tenant during his term, or by the act of a stranger, or by tempest or other providential act, becoming the property of the owner in fee; the latter, that of the tenant.¹

* § 282. **Emblements**, as against the heir, belong to the [* 598] executor or administrator. "The vegetable chattels called

Emblements
go to executor
or administra-
tor; emblements," say the Supreme Court of Pennsylvania,²
"are the corn and other growth of the earth which are
produced annually, not spontaneously, but by labor and

industry, and thence are called *fructus industrialis*." The term includes every product of the earth yielding an annual profit as the result of labor and manuring; such as corn, wheat,³ grain, hops, saffron, hemp, flax,⁴ melons of all kinds,⁵ and the like. But roots, such as carrots, parsnips, turnips, skerrets, &c., are said to belong to the realty, because it is not right that the executor should "dig and break the soil,"⁶ except potatoes, which are held to come within the

because he who
sows should
not, without his
fault, lose the
fruit of his
labor.

description of emblements.⁷ The reason of the rule is, that where the occupant of land has sown or planted the soil with the intention of raising a crop, and his estate determines without his fault before harvest time, he should not lose the fruit of his labor;⁸ to accomplish which the

law gives to him, or, if the tenancy is ended by his death, to his executors or administrators, the profit of the crop.⁹ Hence the right

Emblements are
annual crops, is confined to that kind of crop which actually repays the
labor by which it is produced within the year, excluding

¹ Bewick v. Whitfield, 3 P. Wms. 266, 268; Herlakenden's Case, 4 Co. 63 a; Brackett v. Goddard, 54 Me. 309; Kirtledge v. Woods, 3 N. H. 503, 506 (*dictum*). But in Illinois it was held that logs hewn and lying loosely upon the land, although cut with the view of erecting a granary on the land, do not pass under a deed for the land; Cook v. Whiting, 16 Ill. 480, 482; Wincher v. Shrewsbury, 3 Ill. 283.

² Per Read, J., in Reiff v. Reiff, 64 Pa. St. 134, 137. The statement is taken from Wms. Ex. and will be found at p. [710].

³ McGee v. Walker, 106 Mich. 521.

⁴ Toll. Ex. 150.

⁵ Wentw. Ex. 153.

⁶ Wentw. Ex. 152. Williams calls attention to Lord Coke's statement, that if the tenant plant roots, his executors shall have the year's crop; and suggests that it would be so held to-day; Ex. [710].

⁷ Per Bailey, J., in Evans v. Roberts, 5 B. & C. 829, 832. The reasoning upon which this case was decided would include all roots, and this seems the better doctrine.

⁸ "He that plants must reap": Gwin v. Hicks, 1 Bay, 503; Poindexter v. Blackburn, 1 Ired. Eq. 286, 289.

⁹ Thornton v. Burch, 20 Ga. 791, 792.

The administrator of a devisee for life is entitled to crops sown by the life-tenant, and not the remainderman: Corle v. Monkhouse, 47 N. J. Eq. 73; but where there is a bequest of one-third during life of all grain raised on certain land as soon as harvested and ready for market, the title and possession of the land being vested in others, the administrator of the legatee is not entitled to recover the value of one-third of the crop planted but not harvested prior to the death of the legatee: Miller v. Wohlford, 119 Ind. 305.

fruit-growing trees¹ and growing crops of grass, clover, etc., though sown from seed, and though ready to be cut for hay.² So it has been held that a border of box planted by a tenant (not a gardener) belongs to the realty;³ so strawberries although planted or paid for by the incoming tenant.⁴

but not fruit trees, grass, or clover.

[* 599]* That the executor or administrator is always entitled to emblements as against the heir has already been remarked, though it is otherwise as against the dowress.⁵ But the executor of a tenant in fee is not entitled to emblements as against the devisee, on the ground that by the devise of the land itself the growing crops went with it, thereby excluding the executor.⁶ This distinction, though fully established, is said by both English and American judges to be a capricious one,⁷ and is ignored in Indiana,⁸ and abolished by statute in New York,⁹ as well as, it seems, in Alabama.¹⁰ That the administrator is not entitled to the growing crop sown and planted after the intestate's death seems a self-evident proposition;¹¹ but whether a crop so sown goes at the administrator's sale of the land for the payment of the intestate's debts to the purchaser, is another question, on which different conclusions have been reached. It is held in Indiana, that since such purchaser acquires title from the administrator, he obtains only what the administrator could sell; to wit, whatever came to the administrator from his intestate, including the emblements or growing crop on the land when the intestate died, hence he took no part of the growing crop subsequently sown by the

Executor takes emblements as against the heir, but not the dowress, nor devisee.

¹ Redfield mentions an exception in the case of nurserymen who plant and cultivate trees for sale, which may be removed by the executor or administrator as personalty: 3 Redf. on Wills, 151, pl. 4, citing *Penton v. Robart*, 2 East, 88, *per* Kenyon, C. J., 90. But not if the trees were to be transplanted to the orchard: *Wyndham v. Way*, 4 Taunt. 316; nor unless proof be made that the trees or shrubs were intended to be treated as chattels: *Maples v. Millon*, 31 Conn. 598.

² *Evans v. Iglehart*, 6 Gill & J. 171, 188; *Kain v. Fisher*, 6 N. Y. 597; *Matter of Chamberlain*, 140 N. Y. 390; *Craddock v. Riddlesbarger*, 2 Dana, 205, 206.

³ *Empson v. Soden*, 4 B. & Ad. 655.

⁴ *Watherell v. Howells*, 1 Camp. 227.

⁵ As to dowress, see *infra*.

⁶ *Wms. Ex. [713]*; *Budd v. Hiler*, 27 N. J. L. 43, 52; *per* McIver, J., in *Huff v. Latimer*, 33 S. C. 255, 258; *Fetrow v. Fetrow*, 50 Pa. St. 252.

⁷ *Dennett v. Hopkinson*, 63 Me. 350,

followed in *Hathorn v. Eaton*, 70 Me. 219, 221; *Lord Ellenborough* in *West v. Moore*, 8 East, 339, 343; *Shofner v. Shofner*, 5 Sneed, 94.

⁸ *Humphrey v. Merritt*, 51 Ind. 197, 200, holding that emblements go to the executor as part of the personal estate, and not to the devisee.

⁹ Under the statute crops produced by care and cultivation go to the executor, and are assets to pay debts even as against the devisee: *Andrews, J.*, in *Matter of Chamberlain*, 140 N. Y. 390, 392; when the land is devised, the crop growing thereon is treated as if it were specifically bequeathed to the devisee of the land: *Stall v. Wilbur*, 77 N. Y. 158.

¹⁰ *Blair v. Murphree*, 81 Ala. 454, giving the executor or administrator a reasonable option to make such crops assets.

¹¹ *Fetrow v. Fetrow*, 50 Pa. St. 253, 256; *Rodman v. Rodman*, 54 Ind. 444, 446; relied on in *Kidwell v. Kidwell*, 84 Ind. 224, 228.

heirs.¹ In Illinois and Missouri, on the contrary, it is argued, that as between vendor and vendee growing crops pertain to the realty,² that the sale of land by an administrator is equivalent to a sale by the heir,³ and that a sale of the reversion carries with it all rents under a previous lease, which the grantee can recover in his own name (unless they have been reserved by the instrument of conveyance),⁴ wherefore the purchaser at the administration sale takes the growing crop with the land,⁵—a conclusion which would seem rational enough, if the equivalence of a sale by an heir and by an administrator be conceded.⁶

So it is self-evident, that where a widow or minor children are entitled by statutory provision to the product of the homestead and messuages, the executor or administrator is excluded.⁷

In America the subject of emblements is regulated in many States by statute. In most of them it is provided, that if the owner die between the last day of December and the first day of March, emblements go to the heir; but if he die after the first day of March, emblements severed before the last day of December following are assets in the hands of the executor or administrator.⁸ In North Carolina the statute continues the lease of

Statutes regulating title to emblements.

¹ Barrett v. Choen, 119 Ind. 56, 59.

² Powell v. Rich, 41 Ill. 466, 469.

³ Selb v. Montague, 102 Ill. 446, 451.

⁴ Foote v. Overman, 22 Ill. App. 181, 184.

⁵ Foote v. Overman, *supra*; Page v. Culver, 5 Mo. App. 606, 610.

⁶ The case of Selb v. Montague, cited in the Missouri and Illinois cases, *supra*, as establishing this proposition, turned upon the widow's right to dower in lands mortgaged by her husband, and sold after his death by order of the probate court for the payment of debts. The court distinguishes between mortgaged lands sold by the husband (in which case the widow is entitled to dower in the whole land, if the purchaser obtains discharge of the mortgage), and the payment of the mortgage by the heir after the husband's death (in which case she takes no dower in the land so released without contributing to the payment of the mortgage debt). It is in connection with this question that the court announce the above proposition, to show that a sale by the administrator is equivalent to a sale by the heir (and therefore equivalent to a discharge of the intestate's debt by the heir). It does not seem to sustain the proposition in the sense in which it is applied in the case of Page v.

Culver. In the case of Foote v. Overman, *supra*, the contention seems to have been between the tenants of the heirs as distinguished from the heirs themselves and the purchaser at the administration sale; which accounts for the emphasis put upon the rule, that a sale of the reversion carries the rents subsequently maturing under a previous lease. The court expressly state, that in their opinion the doctrine of emblements has no application. But in the Missouri case the controversy was between the purchaser at the administration sale and the heirs as such, who were sued as having unlawfully converted the crops on the land purchased at the administration sale. This case, then, is irreconcilable with the Indiana case of Barrett v. Choen, 119 Ind. 56.

⁷ Where the widow has the right to emblements, which is disregarded by the administrator, who sells the crop and accounts for the proceeds as part of the estate, she may waive the right to sue for conversion, and pursue and obtain the proceeds: Willits v. Schnyler, 3 Ind. App. 118.

⁸ Green v. Cutright, Wright, 738; Thompson v. Thompson, 6 Munf. 514; Waring v. Purcell, 1 Hill (S. C.) Ch. 193, 196; Singleton v. Singleton, 5 Dana, 87, 93.

a tenant, in lieu of emblements, until the end of the lease year current at the time of the death terminating it, to the end that he may mature and gather the crops.¹ The Alabama statute, giving to the personal representatives the option, reasonably exercised, to complete and gather the crop, or not, is held to be incompatible with his common-law right to emblements as against the heir; and that hence the growing crop passes to the heirs, subject to the administrator's statutory authority to elect to make it assets.²

The widow is entitled to the crop growing on the land assigned to her as dower, "she being then in *de optima possessione viri*, above the executor."³ So if she, as dowress, sow

Dowress entitled to emblements.

the land and marry, the crop will go to her on [*600] the husband's death in preference to his executor or administrator; but if she marry, and her husband sow the land and die, the crop will go to his executor;⁴ for it is well established that, upon the termination of a freehold estate held by the husband in right of his wife, the emblements will go to the husband or his representatives.⁵

Emblements of an estate held by husband and wife go on his death to his executor.

It is hardly necessary to add, that where the law gives emblements, it also gives the right of entry, egress, and regress, so far as may be necessary to cut and remove them.⁶

§ 283. **Fixtures, as between the Heir and the Personal Representative.** — Fixtures are annexations of chattels to the freehold which may, according to concomitant circumstances, assume the character of either real or personal estate.⁷ In its technical sense the word signifies such things only of a personal nature as have been annexed to the realty, and which may be afterward severed or removed by the party who united them, or his personal representatives, against the will of the owner of the freehold; but it is often used indiscriminately in reference to those articles which are not by law removable when once attached to the freehold, as well as those which are severable therefrom.⁸ Questions concerning fixtures are divided by text-writers into such as arise between, 1st, vendor and vendee, including mortgagor and mortgagee;

Fixtures are things of a personal nature annexed to the realty, removable by the party who united them;

things not so removable are also called fixtures.

¹ King v. Foscue, 91 N. C. 116, 118.

² Wright v. Watson, 96 Ala. 536; if the representative does elect to complete and gather the crop, all proper expenses are to be deducted before creditors can claim anything from the proceeds: Naftel v. Osborn, 96 Ala. 623.

³ Budd v. Hiler, 27 N. J. L. 43, 53; Wms. Ex. [717]; Anon., Dyer, 316 a. But she is not entitled to the grass or fruits in her husband's land not assigned for dower: Kain v. Fisher, 6 N. Y. 597. Per Stone,

Ch. J., in Blair v. Murphree, 81 Ala. 454, 457, and cases cited (recognizing the common-law rule to be altered by statute).

⁴ Haslett v. Glenn, 7 Harr. & J. 17, 24.
⁵ Hall v. Browder, 4 How. (Miss.) 224, 230.

⁶ Penhallow v. Dwight, 7 Mass. 34; Parham v. Thompson, 2 J. J. Marsh. 159.

⁷ Washb. on Real Prop., bk. 1, ch. 1, pl. 18.

⁸ Broom's Leg. Max. **418, 419.

2d, heir and personal representative; 3d, landlord and tenant; and 4th, executor of tenant for life and reversioner or remainderman.¹ The subject in hand demands the consideration chiefly of the second and fourth classes; the others will be noticed only in so far as they furnish principles or rules applicable to all. The cases turning upon the law of fixtures are very numerous both in England and America, nor are they in every instance harmonious; but it is neither necessary nor compatible with the limits of this work to follow them in detail or * even to notice all the rules laid down by authors [* 601] on this subject. The leading principles only can be given, and such illustrations as may be decisive of them; referring those in want of a fuller discussion to the elementary works and the multitude of decisions therein referred to. The annotators to the latest editions of Kent's Commentaries have added valuable suggestions and reflections upon the effect of late decisions on this much-vexed subject.

The maxim, *Quicquid plantatur solo solo cedit*, is said to apply with most rigor in favor of the inheritance, and against the right of the personal representative to disannex therefrom and consider as a

According to the ancient rule things affixed to the freehold descended to the heir.

In modern times fixtures used in trade and for ornament or domestic convenience go to the executor;

such as a cider-mill, fire-engine,

personal chattel anything which has been affixed thereto.² Anciently there seems to have been no exception between the executor and heir of the tenant in fee to the rule that whatever was affixed to the freehold descends to the heir;³ but in modern times some relaxations have obtained with respect to fixtures put up by the tenant in fee for the purposes of trade, and for ornament or domestic convenience.⁴ The chattels first held to pass to the executor as trade fixtures were a cider-mill, "though deep in the ground and certainly affixed to the freehold;"⁵ a fire-engine set up for the benefit of a colliery by a tenant for life,⁶ machinery for calico-printing erected by a copartnership,⁷ a granary built on pillars

¹ Washb. on Real Prop., bk. 1, ch. 1, pl. 19; the same distinction is observed in Broom's Legal Maxims, omitting that between vendor and vendee, *417, also in Wms. on Ex. [731] *et seq.* where this subject is elaborately and thoroughly treated, with a copious collection of American authorities in Perkins's annotation to the 6th American edition; see also 3 Redfield on Wills, 156 *et seq.*, and 2 Kent's Com. ** 342 *et seq.*

² Broom's Leg. Max. *418.

³ Godolphin, pt. 2, ch. 14, § 1; Touchstone, p. 470; Noy's Maxims, p. 51.

⁴ Wms. Ex. [732], [741], and authorities; Harkness v. Sears, 26 Ala. 493, 496.

⁵ *Ex relatione* Wilbraham, in Lawton v. Lawton, 3 Atk. 13.

⁶ Lawton v. Lawton, 3 Atk. 13. "This case," says the English annotator, "probably turned upon a custom": p. 16 of 1st Am. from 3d London ed.

⁷ Trappes v. Harter, 3 Tyrw. 603. The case was between the assignees in bankruptcy of mortgagors and the mortgagees; In rendering the opinion, Lord Lyndhurst remarked: "We are of opinion that, with respect to machinery of this description, erected by the bankrupts for the purposes of trade, it would have passed to the executor, and not to the heir": p. 625.

in Hampshire;¹ also, as fixtures set up for ornament and domestic convenience, a furnace, though fixed to the freehold and purchased with the house, and the hangings nailed to the wall;² also tapestry and iron backs to chimneys.³ But the English judges have in [* 602] several * modern instances adhered to the old rule between executors and heirs.⁴ It seems, therefore, that the law is by no means clearly settled respecting the right of the executor of the tenant in fee to fixtures set up for ornament or domestic convenience.⁵ The American cases are not more harmonious. Thus, a furnace so placed in a house that it cannot be removed without injury to the house goes to the heir;⁶ but a still set up in a furnace, in the usual manner, for making whiskey, is not real, but personal property.⁷ And marble slabs resting on brackets screwed into the wall were held to be personalty; but a bell hung upon an axle resting upon a wooden frame placed upon a platform in the cupola of a barn was held to belong to the realty.⁸ All of these cases are reconcilable upon the old rule applied with reference to the nature of fixtures, to wit: If a personal chattel is so affixed to the freehold as to be incapable of being detached therefrom without violence and injury to the freehold, it becomes a fixture, and goes with the real estate; but if it is not so annexed, it remains a chattel, whether the annexation be for use, for ornament, or from mere caprice.⁹

§ 284. **Modern Statement of the Rule.**—The old notion of physical attachment is said, by some courts, to be exploded; the true criterion to determine whether fixtures constitute a part of the realty or not, or rather, whether property usually treated as personal becomes annexed to and goes with the realty as fixtures, must depend upon the circumstances of each case, viewed in the light of the policy of the law and of the intention of the parties.¹⁰ In

machinery,
granary,
furnace,
tapestry,
chimney
backs.

In America
fixtures may
be real

or personal
property.

Old rule.

Criterion of
fixtures de-
pends on cir-
cumstances of
each case
viewed in the
light of policy
and intention.

¹ By the custom: *Coram Eyre*, Ch. B., Summer Assizes, 1724, *apud* Winchester.

² *Squier v. Mayor*, 2 Eq. Cas. Abr. 430. And see *Lord Keeper* in *Beck v. Rebow*, 1 P. Wms. 94.

³ *Harvey v. Harvey*, 2 Stra. 1141.

⁴ So in *Winn v. Ingilby*, 5 B. & Ald. 625, set pots, ovens, and ranges were held to go to the heir; in *Colegrave v. Dias Santos*, 2 B. & C. 76, stoves, coaling copers, and blinds; and in *King v. St. Dunstan*, 4 B. & C. 686, stoves and grates fixed with brick-work in the chimney places, and cupboard standing on the ground supported by holdfasts, all removable without

injury to the freehold, were held to belong to the heir, and not the executor.

⁵ *Wms. Ex.* [739].

⁶ *Main v. Schwarzwaelder*, 4 E. D. Smith (N. Y.), 273; *Tuttle v. Robinson*, 33 N. H. 104.

⁷ *Burk v. Baxter*, 3 Mo. 207; *Moore v. Smith*, 24 Ill. 512; *Terry v. Robins*, 5 Sm. & M. 291; *Crenshaw v. Crenshaw*, 2 Hen. & Munf. 22; *McClintock v. Graham*, 3 McC. (S. C.) 553.

⁸ *Weston v. Weston*, 102 Mass. 514.

⁹ *Providence Gas Co. v. Thurber*, 2 R. I. 15.

¹⁰ *Quinby v. Manhattan Co.*, 24 N. J.

other * words, whatever chattel is so affixed to the free- [*603] hold as to be detachable therefrom without substantial injury, with the view and for the purpose of its more complete enjoyment as a chattel, remains a chattel, and may be removed as such; but if attached to the freehold without such intention, it will be incorporated therewith.¹ A house, fence, or other erection on the land of another, with the mutual intention that it is to be held as the builder's property, continues to be personal property, and may be removed at the end of the license.² So the road-bed of a railroad may be personalty; a railway and the rails fastened to it may be trade fixtures removable as personal property,³ while hay-scales, annexed to the realty in the usual manner, go to the heirs as real estate, although they had been included in the inventory as personalty.⁴ So water-wheels, millstones, running gear, and bolting apparatus of a grist and flouring mill, and other fixtures of a like nature, are constituent parts of the mill, descending with the real estate,⁵ while carding machines, looms, and other machinery used in manufacturing cloth, which are complete in themselves and capable of being used in one place as well as in another, not requiring to be fitted in the building and fixed to it only to give stability to the machinery, are held to be personalty,⁶ but if but machinery, machinery, though so constructed as to be portable and easily conveyed from place to place as may be desired, etc., may, although portable, be realty. is affixed with the intention and for the purpose of being used as a permanent structure in connection with the building, it becomes part of the realty;⁷ and such intention may be presumed from the circumstances.⁸ Manure from the barn-yard of a homestead, although neither rotten nor incorporated with the ground, but in a pile for future use, belongs to the

Eq. 260, 264; Washb. R. Pr., bk. 1, ch. 1, pl. 18; *Hill v. Sewald*, 53 Pa. St. 271, 274, citing numerous authorities; *Thomas v. Davis*, 76 Mo. 72, 76; *Equitable Co. v. Christ*, 2 Flip. 599; *Green v. Phillips*, 26 Gratt. 752, 762; *Manwaring v. Jenison*, 61 Mich. 117, 134, citing numerous cases.

¹ "Physical annexation to realty is not necessary to convert a chattel into a fixture. If the article, either fast or loose, be indispensable in carrying on the specific business, it becomes part of the realty": *Morris's Appeal*, 88 Pa. St. 368, 383; *Ege v. Kille*, 84 Pa. St. 333, 340. So an article which would otherwise be deemed a fixture may, by severance and the understanding of the parties, become a chattel: *Sampson v. Graham*, 96 Pa. St. 405, 408.

² Hence a house built on a man's lot with his wife's money, with the agreement that it remains her property, on her death goes to her administrator, who may obtain equitable relief in a proper case; *Brown v. Turner*, 113 Mo. 27.

³ *Northern Railway v. Canton*, 30 Md. 347, 352; so a depot: *Railroad v. Deal*, 90 N. C. 110.

⁴ *Dudley v. Foote*, 63 N. H. 57.

⁵ *House v. House*, 10 Pai. 158; *Lapham v. Norton*, 71 Me. 83.

⁶ *Tobias v. Francis*, 3 Vt. 425; *Gale v. Ward*, 14 Mass. 352; *Walker v. Sherman*, 20 Wend. 636; 3 Redf. on Wills, 161, pl. 4; *Hill v. Wentworth*, 28 Vt. 428, 432.

⁷ *Potter v. Cromwell*, 40 N. Y. 287.

⁸ *Voorhees v. McGinnis*, 48 N. Y. 278.

realty;¹ but manure made in a livery stable, or [* 604] in any manner not connected with *agriculture or husbandry, is personalty, and goes to the executor.² A fence enclosing a field, of whatever material or construction, whether having posts inserted in the ground or not, is part of the freehold;³ nor does it cease to be so, though accidentally or temporarily detached therefrom without intent on the part of the owner to divert it permanently from its use;⁴ but rails in stacks, not having been used for a fence, are personalty.⁵ On the same principle, hop-poles, necessary in cultivating hops, are part of the real estate, though taken down for the purpose of gathering the crop, and piled in the yard with the intention of being replaced in the season of hop-raising.⁶ That keys, doors, windows, bolts, rings, etc., belonging to a house, though temporarily detached therefrom, belong to the realty, is self-evident. So with pictures, glasses, etc., taking the place of wainscoting; for "the house ought not to come to the heir maimed and disfigured."⁷ As between devisee and executor, the rule is that a devisee shall take the land in the same condition as it would have descended to the heir; hence he is entitled to all the articles affixed to the land, whether annexed before or subsequent to the date of the devise; for if a freehold house be devised, fixtures pass, but if the tenant for life or in tail devise fixtures, his devise is void, he having no power to devise such fixtures as would pass to the executor.⁸ The executor is therefore entitled to all the fixtures as against the devisee, that he would be entitled to as against the heir.⁹ But there seems to be no doubt that if, from the nature and condition of the property devised, it is apparent that the testator intended the fixtures to go with the freehold to the devisee, they will pass to him, although of a character which would go to the executor as against the heir.¹⁰

livery stable
manure per-
sonalty;

enclosure be-
longs to the
realty, though
detached;

rails in stacks,
not used as a
fence, per-
sonalty.

Hop-poles,

keys, locks,
etc.,

pictures,
glasses, etc.,
instead of
wainscoting,
realty.

As between
devisee and ex-
ecutor, devisee
takes the land
as it would go
to the heir,

and executor is
entitled to fix-
tures as he
would be
against the
heir.

¹ *Fay v. Muzzey*, 13 Gray, 53; *Plumer v. Plumer*, 30 N. H. 558, 568; *Kittredge v. Woods*, 3 N. H. 503; *Lassell v. Reed*, 6 Me. 222; whenever made in the ordinary course of husbandry: *Snow v. Perkins*, 60 N. H. 493; *Norton v. Craig*, 68 Me. 275.

² *Snow v. Perkins*, 60 N. H. 493; *Daniels v. Pond*, 21 Pick. 367; *Needham v. Allison*, 24 N. H. 355.

³ *Smith v. Carroll*, 4 Green (Iowa), 146; *Glidden v. Bennett*, 43 N. H. 306; *Kimball v. Adams*, 52 Wis. 554.

⁴ *Goodrich v. Jones*, 2 Hill (N. Y.), 142.

⁵ *Clark v. Burnside*, 15 Ill. 62.

⁶ *Bishop v. Bishop*, 11 N. Y. 123.

⁷ *Cave v. Cave*, 2 Vern. 508; *Guthrie v. Jones*, 108 Mass. 191; *Ward v. Kilpatrick*, 85 N. Y. 413.

⁸ *Broom's Leg. Max.* ** 423, 424.

⁹ *Wms. Ex.* [739].

¹⁰ So where a testator devised his freehold estate, consisting of a brew-house and malt-house in lease, with the plant and utensils, it was held that the plant passed with the brew-house, on the ground that the testator intended to devise the plant as well as the shell of the brew-house:

* § 285. **Fixtures as between Personal Representative of [* 605] Life Tenant and Remainderman.**—Since the heir is more

favoured in law than the remainderman or reversioner, in this respect, or rather, since the law is more indulgent to the executor of the

Executor's
right to fix-
tures as against
the heir applies
a fortiori
against the re-
mainderman.

particular tenant than to the executor of the tenant in fee, it follows that all the authorities which establish the executor's right to fixtures as against the heir will apply *a fortiori* against the remainderman or rever-

sioner.¹ As between landlord and tenant, there is

great deviation from the rule, that what has been once annexed to the freehold becomes a part of it, and it would be erroneous to conclude that, because a fixture set up for ornament or domestic convenience has been decided to be removable as between landlord and tenant, therefore such fixture may be claimed as personalty by the executor of a tenant for life, etc.; still, there is much similarity between the two classes, and although the case of a tenant for life is not quite so strong as that of a common tenant, yet the

Right of ten-
ants in trade
does not ex-
tend to agricul-
tural tenants;

but a pump
erected by
tenant may be
removed.

reasoning is closely analogous between them.² It is held, in this respect, that the privilege established in favor of tenants in trade does not extend to agricultural tenants, so as to entitle them to remove erections for the

purposes of husbandry.³ But a pump erected by a tenant at his own expense, although in doing so an open

well was arched over, and the pump was attached to a perpendicular plank fastened at the upper end by an iron bolt to an adjacent wall, was held to be removable as a tenant's fixture.⁴ So

the executor of a tenant by the curtesy was held to be entitled, as against the remainderman, to an engine, cotton-gin, and condenser, which were attached to a mill by the tenant for the mixed purpose

Tenant's exec-
utor and
administrator
take same

of trade and agriculture.⁵ It is obvious that the executor and administrator of a tenant take the same

property in fixtures, as against the *owner of [* 606]

Wood v. Gaynon, Ambl. 395. It will be noticed that this rule, like the analogous one with regard to emblements, *ante*, § 282, p. * 599, is but the application of the familiar principle, that in the construction of wills the intention of the testator, if ascertainable from the instrument, must govern.

¹ *Broom's L. M.* * 426; *Wms. Ex.* [741].

² *Wms. Ex.* [744]; *Gray, J.*, in *Bainway v. Cobb*, 99 Mass. 457.

³ So the tenant of a farm under a lease for twenty-one years, who fifteen years before the expiration of his term erected thereon at his own expense a substantial

beast-house, carpenter's shop, fuel-house, pump-house, and fold-yard wall, and before the expiration of his term pulled down the erections, dug up the foundations, and carried away the materials, leaving the farm in the same condition in which he entered upon it, was held liable to the reversioner for the value of the buildings: *Elwes v. Maw*, 3 East, 38. And see cases cited in *Wms. on Ex.* [745], and notes (s) and (t).

⁴ *Grymes v. Boweren*, 6 Bing. 437; *McCracken v. Hall*, 7 Ind. 30; *Wall v. Hinds*, 4 Gray, 256, 272, *et seq.*

⁵ *Overman v. Sasser*, 107 N. C. 432.

the fee, or the reversioner, as the testator or intestate had therein; and that the legal right of a tenant to remove fixtures may be governed by express stipulation, usually inserted in a lease for this purpose.¹ The privilege of removing fixtures should be exercised by a tenant during his term; for if he omit to do so, it will be presumed that he voluntarily relinquishes his claim in favor of the landlord.²

property in
fixtures as
decendent had.

The subject of fixtures has engaged the attention of legislative authorities. To the extent of the statutory provisions they are, of course, controlling; but where the statute enacts a rule for a class of cases, it does not extend to cases not within such class. Thus it was held in New York, that the statutory rule of fixtures between the personal representatives and the heirs of a deceased party is not controlling in cases between vendor and vendee.³

Statutory
regulations.

§ 286. **Separate Property of the Wife.**—The law in regard to the separate property of married women has of late undergone great changes, both in England and America; there has been and still is a strong tendency in both countries to supersede the common-law rules on this subject by the principles of the civil law, and to accord to married women as a legal right what formerly they could enjoy

only under the ægis of a court of equity.⁴ It is

[* 607] * necessary, therefore, to remember, that in all

cases where by statutory provision property of a married woman is secured to her against the power or

Property se-
cured to wife
survives to her
on her hus-
band's death,

¹ Broom's L. M. **429, 430.

² Talbot v. Whipple, 14 Allen, 177, 181; White v. Arndt, 1 Whart. 91; Darrah v. Baird, 101 Pa. St. 265; State v. Elliot, 11 N. H. 540; if not removed during the term, the right is renounced, although the tenant subsequently take a new lease: Shepherd v. Spaulding, 4 Met. (Mass.) 416; Hedderich v. Smith, 103 Ind. 203, and authorities cited; Marks v. Ryan, 63 Cal. 107; Watriss v. Bank, 124 Mass. 571; Smith v. Park, 31 Minn. 70.

³ McRea v. Central Bank, 66 N. Y. 489, 495.

⁴ Married women, under the coexistence of legal and equitable principles governing their property, are placed in this anomalous predicament: that property which is theirs in their own right and name (legal property) they can neither control, enjoy, nor alienate; but property which is not theirs in law, that is, which is held for them by a trustee (equitable property) is completely within their control, to be disposed of or alienated at their personal pleasure. Judge McIlvaine, in

Phillips v. Graves, 20 Oh. St. 371, 381, thus pithily describes this strange anomaly in English and American jurisprudence: "Courts of law and courts of equity coexistent in the same realm,—the former merging the legal existence of the wife in the husband, the latter recognizing her separate existence,—the former declaring her incapable of acquiring, holding, or disposing of property,—the latter recognizing her ability to acquire, control, and dispose of her estate,—the former denying her capacity to contract, or to sue or be sued,—the latter enforcing her agreements by granting relief both for and against her!—And yet no conflict of jurisdiction, for the simple reason that courts of law take jurisdiction of the wife's general property and give it all to the husband, and courts of equity take exclusive cognizance of her separate estate and control it for her sole benefit. While the judge declares her contracts absolutely void, the chancellor proceeds *in rem* and charges her separate estate as equity and good conscience require."

control of the husband, it will survive to her after his death, and the husband's executor or administrator has no title thereto; and if the husband survive the wife, such property will go to her executor or administrator, and the husband has no interest therein unless he administer on her estate, or take the property by virtue of some statutory provision. But at common law the husband is entitled to and becomes the owner of all chattels which the wife owned before marriage, or which come to her during the existence of the marriage, whether she survives him or not; and consequently, though she survive him, they will go to his executor if he makes a will, or to his administrator if he dies intestate. But if property be conveyed or bequeathed to or settled upon her, through the intervention of trustees, or even without, for her separate use, it will not, upon his death, become a part of the beneficial estate of his executors or administrators.¹ To accomplish this purpose it is necessary that the conveyance to the wife should show the clear intention of the donor to deprive the husband of his marital rights.² A separate estate may be created in a *feme sole* as well as a married woman, which after marriage will be good against the husband's marital rights; and where such estate is created without the intervention of trustees, the husband will take the legal title, but equity will regard him as a trustee for the wife.³

* It is sometimes held, that an express trust for the benefit [* 608] of a married woman in personal property ceases upon discovery,⁴ and is not revived upon a second marriage.⁵

¹ Wms. Ex. [749] *et seq.*, citing Co. Lit. 351 b; Jamison v. May, 13 Ark. 600; Hopper v. McWhorter, 18 Ala. 229; Parker v. Converse, 5 Gray, 336; Gully v. Hull, 31 Miss. 20. And although the wife's chattels become the husband's by virtue of the marital relation, he may waive his rights as such, and by his declarations, acts, and dealings, free and relieve her property from his marital claims: Clark v. Clark, 86 Mo. 114, 123.

² Williams v. Claiborne, 7 Sm. & M. 488; Carroll v. Lee, 3 G. & J. 504; Hale v. Stone, 14 Ala. 803; Hubbard v. Bugbee, 58 Vt. 172, 177; Duke v. Duke, 81 Ky. 308; Hart v. Leete, 104 Mo. 315. The words "to her and her heirs' proper use" do not create a separate estate in a legacy to a married daughter: Rudisell v. Watson, 2 Dev. Eq. 430.

³ Riley v. Riley, 25 Conn. 154; Fears

v. Brooks, 12 Ga. 195; Robert v. West, 15 Ga. 122, 134, *et seq.*; Fellows v. Tann, 9 Ala. 999, 1003; Shirley v. Shirley, 9 Pa. 363; Waters v. Tazewell, 9 Md. 291; Nix v. Bradley, 6 Rich. Eq. 43; Bridges v. Wilkins, 3 Jones Eq. 342; Beaufort v. Collier, 6 Humph. 487; Gordon v. Eans, 97 Mo. 587, 601; Schafroth v. Ambs, 46 Mo. 114. Even in case of a direct gift from husband to wife: Thomas v. Harkness, 13 Bush, 23.

⁴ Roberts v. Moseley, 51 Mo. 282, 286.

⁵ On the ground that an attempted restriction of a gift to the separate use of a married woman is impracticable: Hamersley v. Smith, 4 Whart. 126, 128. It is held in a number of Pennsylvania cases, that a trust for coverture can take effect only if immediate marriage is contemplated: Ogden's Appeal, 70 Pa. St. 501; Dodson v. Ball, 60 Pa. St. 492; Hepburn's

§ 287. **Ante-nuptial and Post-nuptial Settlements.** — Ante-nuptial settlements of money, jewels, furniture, or other movables, by the husband upon the wife, are valid against the husband and all claiming under him, as well as his creditors.¹ The title of the wife is good, even against creditors, and *a fortiori* against the executor or administrator, although the settlor contemplated defrauding his creditors, if the future wife had no notice and did not participate in the intent.² So an agreement before marriage, in writing, that the wife shall be entitled to specific parts of her personal estate to her specific use, will be enforced in equity, although the legal title be vested in the husband by the subsequent marriage;³ the husband in such case becomes trustee for his [* 609] wife's separate use, and the trust will bind his executors *and administrators.⁴ But a promissory note given by a husband to his wife before marriage becomes a nullity by the marriage, and is not revived by the death of the husband;⁵ it remains valid,

Personal property settled on the wife goes to her, not to the husband's representative,

although so settled in fraud of creditors.

Appeal, 65 Pa. St. 468, and many others. So in North Carolina: *Apple v. Allen*, 3 Jones Eq. 120; *Miller v. Bingham*, 1 Ired. Eq. 423; *Lindsay v. Harrison*, 8 Ark. 302. In Kentucky it is held that a separate estate may be made to extend to a particular coverture, or to any number, regardless whether before or during coverture. It is always a question of intention with the conveyor or deviser: *Duke v. Duke*, 81 Ky. 308, 311.

¹ 2 Sugd. on Vend. & Purch., bottom p. 715, and authorities; *Vogel v. Vogel*, 22 Mo. 161; *De Barante v. Gott*, 6 Barb. 492; *Miller v. Goodwin*, 8 Gray, 542; *Tisdale v. Jones*, 38 Barb. 523; *Williams v. Maull*, 20 Ala. 721. Ante-nuptial contracts intended to regulate and control the interest which each shall take in the property of the other during coverture or after death will be enforced in equity according to the intention of the parties. The court will impose a trust commensurate with the obligations of the contract: *Johnston v. Spicer*, 107 N. Y. 185. To same effect, *Desnoyer v. Jordan*, 27 Minn. 295; *Forwood v. Forwood*, 86 Ky. 114. Such a contract is binding on the wife, unless the provision is so disproportioned to the husband's means as to create a presumption of fraud: *Smith's Appeal*, 115 Pa. St. 319; *Achilles v. Achilles*, 151 Ill. 136; and see further on the subject of presumed fraud from the

relation existing between the parties, *ante*, § 118, p. *264, note 5.

² *Clay v. Walter*, 79 Va. 92; *Andrews v. Jones*, 10 Ala. 400, 421; *Bunnell v. Witherow*, 29 Ind. 123, 132; *Frank's Appeal*, 59 Pa. St. 190, 194; *Tunno v. Trezevant*, 2 Desaus. 264; *Magniac v. Thompson*, 7 Pet. 348, 393; *Prewitt v. Wilson*, 103 U. S. 22.

³ In some States even an oral ante-nuptial agreement to this effect was held good: *Southerland v. Southerland*, 5 Bush, 591; *Child v. Pearl*, 43 Vt. 224; *Riley v. Riley*, 25 Conn. 154; at least upon waiver of the Statute of Frauds: *Kirksey v. Kirksey*, 30 Ga. 156. But the Statute of Frauds is generally a defence against an executory ante-nuptial marriage contract: *Lloyd v. Fulton*, 91 U. S. 479; *Bradley v. Saddler*, 54 Ga. 681, 684.

⁴ 2 Sugd. on Vend. & Purch. [718], and American authorities by Perkins, note (d¹).

⁵ *Chapman v. Kellogg*, 102 Mass. 246; *Ingham v. White*, 4 Allen, 412; *Abbott v. Winchester*, 105 Mass. 115; *Patterson v. Patterson*, 45 N. H. 164; *Smiley v. Smiley*, 18 Oh. St. 543. But such a note remains in force after the marriage by virtue of the statute of New York: *Wright v. Wright*, 59 Barb. 505. So in Iowa: *Logan v. Hall*, 19 Iowa, 491; and it seems in Massachusetts: *Butler v. Ives*, 139 Mass. 202, disapproving *Chapman v. Kellogg*, and *Abbott v. Winchester*, *supra*.

however, if the statute secures the wife's personal property to her.¹

Post-nuptial settlements, as well as gifts by the husband to the wife during coverture, are valid against himself and all who claim as volunteers under or through him,² and even against creditors, unless fraudulent as to them.³ They are deemed fraudulent if the debts of the settlor were considerable at the time of making the settlement, and would be defeated thereby;⁴ or if, though not *indebted at the very time, yet he became so [* 610] shortly afterward, so that it may be presumed that he made the settlement with a view to becoming indebted at a future time.⁶ But, in general, debts subsequently incurred will not defeat a post-nuptial settlement, nor will the presumption of fraud arise if the debts were inconsiderable, or if, though considerable, the settlement itself provides for their payment, or if they are secured by mortgages or other means.⁶ The reservation by the husband of a power to

¹ *Stone v. Gazzam*, 46 Ala. 269; see cases in preceding note.

² *Paschall v. Hall*, 5 Jones Eq. 108; *Teasdale v. Reaborn*, 2 Bay, 546, 550; *Rogers v. Ludlow*, 3 Sandf. Ch. 104; *Butler v. Rickets*, 11 Iowa, 107; *Barker v. Koneman*, 13 Cal. 9; *Scogin v. Stacy*, 20 Ark. 265; *Brckett v. Waite*, 4 Vt. 389; *Sims v. Rickets*, 35 Ind. 181; *Bancroft v. Curtis*, 108 Mass. 47; *Hunt v. Johnson*, 44 N. Y. 27; *Mayfield v. Kilgour*, 31 Md. 240.

³ *Moore v. Page*, 111 U. S. 117; *Bertrand v. Elder*, 23 Ark. 494; *Picquet v. Swan*, 4 Mas. (U. S. C. C.) 443; *Wiley v. Gray*, 36 Miss. 510; *Leavitt v. Leavitt*, 47 N. H. 329; *Larkin v. McMullin*, 49 Pa. St. 29; *Kane v. Desmond*, 63 Cal. 464; *Pomeroy v. Bailey*, 43 N. H. 118; *Niller v. Johnson*, 27 Md. 6; *Gilligan v. Lord*, 51 Conn. 562; *Fisher v. Williams*, 56 Vt. 586; *Tootle v. Coldwell*, 30 Kan. 125.

⁴ *Borst v. Corey*, 16 Barb. 136, 139; *Gardner v. Baker*, 25 Iowa, 343; *Kuhn v. Stansfield*, 28 Md. 210; *Jones v. Morgan*, 6 La. An. 630; *William & Mary College v. Powell*, 12 Gratt. 372, 381; *Williams v. Avery*, 38 Ala. 115; *Allen v. Walt*, 9 Heisk. 242; *Clayton v. Brown*, 30 Ga. 490; *Reynolds v. Lansford*, 16 Tex. 286. But the presumption of fraud may be rebutted; *Thacher v. Phinney*, 7 Allen, 146; *Woolstone's Appeal*, 51 Pa. St. 452; *Babcock v. Eckler*, 24 N. Y.

623; *Belford v. Crane*, 16 N. J. Eq. 265; *Potter v. McDowell*, 31 Mo. 62; *Walsh v. Ketchum*, 84 Mo. 427; *Norton v. Norton*, 5 Cush. 524; *Filley v. Register*, 4 Minn. 391; *Freeman v. Burnham*, 36 Conn. 469, 473; *Sweeney v. Damron*, 47 Ill. 450, 457. See an elaborate discussion of the principles applicable to a voluntary conveyance between creditors of the grantor and claimants under the deed, by J. J. Baldwin and Stanard, in the case of *Hunters v. Waite*, 3 Gratt. 26, op. pp. 32-72, citing English and American textbooks and decisions: *Ellinger v. Crowl*, 17 Md. 361; *Annin v. Annin*, 24 N. J. Eq. 184; *Phelps v. Morrison*, 24 N. J. Eq. 195; *Kipp v. Hanna*, 2 Bland Ch. 26; *Moritz v. Hoffman*, 35 Ill. 553; *Tripner v. Abrahams*, 47 Pa. St. 220; *Reade v. Livingston*, 3 Johns. Ch. 481; *Woodson v. Pool*, 19 Mo. 340. A conveyance from husband to wife without consideration is void as against existing creditors, although no fraud be actually intended; *Robinson v. Clark*, 76 Me. 493; *Watson v. Riskamire*, 45 Iowa, 231.

⁵ *Case v. Phelps*, 39 N. Y. 164; *Townsend v. Maynard*, 45 Pa. St. 198; *Phillips v. Wooster*, 36 N. Y. 412. It matters not as to subsequent creditors that the conveyance includes all the husband's realty, and is a large proportion in value of all his property; *Thompson v. Allen*, 103 Pa. St. 44, 48.

⁶ *Gridley v. Watson*, 53 Ill. 186, 193;

revoke the limitations in favor of the wife is said by Williams to be a badge of fraud;¹ but the contrary is held by the Supreme Court of the United States, indicating that the absence of such a power is often considered a badge of fraud.² So, fraud may be presumed from continual possession in the husband after a transfer purporting to be absolute.³ Where the settlement after marriage is made for a valuable consideration, the presumption of fraud fails, though the husband be indebted at the time.⁴ A written agreement before marriage is a good consideration, but not a verbal agreement.⁵ A contract in consideration of the settlement of existing differences, and the avoidance of future difficulties and dissensions, or of the return of a wife who is legally justified in her absence from the husband, is founded on a valid consideration.⁶ In the case of *Lloyd v.*

Fraud presumable from reservation of power to revoke;

and from continual possession by the husband after gift,

unless made for a valuable consideration.

[* 611] * *Fulton*,⁷ Mr. Justice Swayne, delivering the opinion of the Supreme Court of the United States, lays down this rule upon the subject of post-nuptial marriage settlements: "Prior indebtedness is only presumptive, and not conclusive proof of fraud, and this presumption may be explained and rebutted. Fraud is always a question of fact with reference to the intention of the grantor. Where there is no fraud there is no infirmity in the deed. Every case depends upon its circumstances, and is to be carefully scrutinized. But the vital question is always the good faith of the transaction. There is no other test."

Rule by Supreme Court of the United States.

§ 288. **The Wife's Savings from Separate Trade, Pin-money Gifts, etc.**—A wife may also acquire separate property by carrying

Bridgford v. Riddell, 55 Ill. 261, 267; *Brookbank v. Kennard*, 41 Ind. 339; *Stephenson v. Donahue*, 40 Oh. St. 184; *White v. Bettis*, 9 Heisk. 645.

¹ *Wms. Ex.* [754], on the authority of 1 *Roper, Husband & Wife*, p. *315.

² *Jones v. Clifton*, 101 U. S. 225, 229.

³ *Moore v. Page*, 111 U. S. 117, 119; *Putnam v. Osgood*, 52 N. H. 148, 153, *et seq.*; *Coolidge v. Melvin*, 42 N. H. 510; *Rothchild v. Rowe*, 44 Vt. 389. Where real and personal property were conveyed, it was held that the notice of the wife's general ownership, furnished by the recorded deed, would be such a presumption of ownership of the personal property on the premises as would reasonably lead any person observing the husband's use of the property to conclude that he

was using it as hers: *Gilligan v. Lord*, 51 Conn. 562, 568.

⁴ *Barnum v. Farthing*, 40 How. Pr. 25; *Duffy v. Insurance Co.*, 8 W. & S. 413; *Medsker v. Bonebrake*, 108 U. S. 66, 73; *Atlantic Bank v. Tavenor*, 130 Mass. 407, 410; *Bean v. Patterson*, 122 U. S. 496; *Dice v. Irvin*, 110 Ind. 561.

⁵ But not if the settlement is for more than the agreement stipulated: *Saunders v. Ferrill*, 1 Ired. L. 97. See *Smith v. Allen*, 5 Allen, 454; *Peiffer v. Lytle*, 58 Pa. St. 386; *Izard v. Izard*, 1 Bailey Eq. 228; *Wood v. Savage*, 2 Doug. (Mich.) 316; *Simpson v. Graves*, Riley Ch. 232, 237. But see, where parol agreement is held sufficient, *ante*, p. *608, note 3.

⁶ *Burkholder's Appeal*, 105 Pa. St. 31, 37.

⁷ 91 U. S. 479, 485.

Money saved by the wife with husband's consent goes to her at his death,

which case it will be void against creditors, but binding on him and his personal representatives.² And the savings of the wife arising from her separate property, gifts from the husband to the wife, pin-money, and similar allowances to her, or jewels or other things purchased by her out of her separate estate, belong to her, and do not constitute assets in the hands of the husband's executor or administrator.³ But

Gift by husband to wife must be established by clear testimony.

Property put by husband in joint name of husband and wife goes to her, and not to his executor or administrator.

on a business or trade on her own account, by permission of the husband, either in consequence of an express agreement between her and her husband before the marriage, in which case it will be binding also against creditors,¹ or where he consents during the marriage, in which case it will be void against creditors, but binding on him and his personal representatives.² And the savings of the wife arising from her separate property, gifts from the husband to the wife, pin-money, and similar allowances to her, or jewels or other things purchased by her out of her separate estate, belong to her, and do not constitute assets in the hands of the husband's executor or administrator.³ But to establish a gift by the husband to the * wife, [* 612] there must be clear and incontrovertible proof, and nothing less than an irrevocable gift, either to some person in trust or by some clear and distinct act, will do.⁴ Stocks purchased by the husband in the name of himself and his wife, money loaned out on securities taken in the name of husband and wife, and property purchased in their joint names or in the wife's name, will all be presumed, in cases clear of fraud, to have been intended as an advancement and provision for the

¹ *Young v. Jones*, 9 *Humph.* 551; *Young v. Gori*, 13 *Abb. Pr.* 13, note, p. 15; *Sanford v. Atwood*, 44 *Conn.* 141, 143; see also *State v. Smit*, 20 *Mo. App.* 50, 54.

² *Rogers v. Fales*, 5 *Pa. St.* 154; *Gentry v. McReynolds*, 12 *Mo.* 533; *Jones v. Reid*, 12 *W. Va.* 350 (not deciding as to the validity of such an agreement as against creditors), 365.

³ *Barron v. Barron*, 24 *Vt.* 375; *Richardson v. Merrill*, 32 *Vt.* 27; *Nelson v. Hollins*, 9 *Baxt.* 553; *Miller v. Williamson*, 5 *Md.* 219; *Rush v. Vought*, 55 *Pa. St.* 437; *Towers v. Hagner*, 3 *Whart.* 48, 56, *et seq.*; *Yardley v. Raub*, 5 *Whart.* 117; *Kee v. Vasser*, 2 *Ired. Eq.* 553; *Merritt v. Lyon*, 3 *Barb.* 110; *Rawson v. Penn. R. R. Co.*, 2 *Abb. Pr. n. s.* 220; *Eddins v. Buck*, 23 *Ark.* 507; *Peck v. Brunnagin*, 31 *Cal.* 440; *Churchill v. Corker*, 25 *Ga.* 479; *Skillman v. Skillman*, 13 *N. J. Eq.* 403; *Wells v. Treadwell*, 28 *Miss.* 717; *Dale v. Lincoln*, 62 *Ill.* 22; *Coates v. Gerlach*, 44 *Pa. St.* 43; *Vance v. Nogle*, 70 *Pa. St.* 176; *Butterfield v. Stanton*, 44 *Miss.* 15; *Pinney v. Fellows*, 15 *Vt.* 525; *Wood v. Warden*, 20 *Ohio*, 518; *Hutton v. Hutton*, 3 *Pa. St.* 100; *Resor v. Resor*,

9 *Ind.* 347; *Thompson v. Mills*, 39 *Ind.* 528; *Bent v. Bent*, 44 *Vt.* 555; *Goree v. Walthall*, 44 *Ala.* 161. An agreement between husband and wife, whereby the former receives her personal property to hold as trustee for her minor children, is enforceable in equity: *Hammons v. Renfrow*, 84 *Mo.* 332.

⁴ *George v. Spencer*, 2 *Md. Ch.* 353; *Woodson v. Pool*, 19 *Mo.* 340; *Manny v. Rixford*, 44 *Ill.* 129; *Jennings v. Davis*, 31 *Conn.* 134; *Herr's Appeal*, 5 *W. & S.* 494; *Crissman v. Crissman*, 23 *Mich.* 217; *Woodford v. Stephens*, 51 *Mo.* 443; *Trowbridge v. Holden*, 58 *Me.* 117; *Hayt v. Parks*, 39 *Conn.* 357; *Williams's Appeal*, 106 *Pa. St.* 116. Where a wife deposited money in a bank, mostly the proceeds of her own earnings, in the absence of evidence showing the same to have been done with the consent of the husband, or other evidence of a gift, he is entitled to the money at her death: *McDermott's Appeal*, 106 *Pa. St.* 358. But her separate title to personalty may be established by words, acts, and conduct, as well as by writing: *McCoy v. Hyatt*, 80 *Mo.* 130; *Bettes v. Magoon*, 85 *Mo.* 580; *Armitage v. Mace*, 96 *N. Y.* 538.

wife, and on surviving him she will be entitled thereto, as against his executors or administrators if he has not aliened them during his lifetime.¹ Pin-money, being intended not for the sustentation of the wife, but for her dress and ornaments in a station suitable to the degree of the husband, cannot be claimed against the husband's executor or administrator for a period farther back than one year's allowance, nor where the wife dies can it be claimed by her representatives at all. Where it is settled upon the wife by an ante-nuptial agreement, it is payable to her as against

Pin-money goes to her to the extent of a year's allowance.

But on her death not to her representatives at all.

creditors; but her savings out of pin-money, or other allowances by the husband not in pursuance of an ante-nuptial contract, as well as jewels so purchased by the wife out of them, will be assets to pay the husband's debts, although protected from voluntary claims.² But in the United States there is little or no occasion for the application of any rules concerning pin-money; this subject, as well as that of paraphernalia,³ is generally merged in, and governed by, the statutory provisions for the protection of married women and the support of the family upon the death of the husband.⁴

§ 289. *The Wife's Paraphernalia.* — Paraphernalia of the wife include her wearing apparel and ornaments, suitable to her station in life. It is held in England that what constitutes paraphernalia is a question to be decided by the court, depending upon the rank and fortune of the parties; and the books are full of cases distinguishing between the nature and value of the jewels, ornaments, and garments as constituting, or not, the wife's paraphernalia.⁵ In

¹ *Draper v. Jackson*, 16 Mass. 480; *Phelps v. Phelps*, 20 Pick. 556; *Sanford v. Sanford*, 5 Lans. 486, 495; 61 Barb. 293. And after the wife's death they go to her administrator, if in her name alone: *Leland v. Whitaker*, 23 Mich. 324. If the husband purchase land with his wife's money, and without her knowledge or consent takes the deed in his own name, and afterward sell such land, she is entitled to the amount received therefor. And if he buy land with money partly hers and partly his own, taking the deed in his own name without her knowledge or consent, she is entitled to recover from the estate the amount so invested: *Dayton v. Fisher*, 34 Ind. 356. If, on the other hand, the husband receives the rent from his wife's separate estate, the circumstances showing that the wife did not intend to charge the husband, and that he did not intend to account, then the courts cannot, after his death, charge his estate:

Bristol v. Bristol, 93 Ind. 281. See also *Adams v. Brackett*, 5 Met. (Mass.) 280; *Fowler v. Rice*, 31 Ind. 258; *Bergey's Appeal*, 60 Pa. St. 408; *Sawyers v. Baker*, 77 Ala. 461; *Gainus v. Cannon*, 42 Ark. 503.

² See the case of *Digby v. Howard*, 4 Sim. 588, for a discussion of this subject; the decision of the Vice-Chancellor, allowing the wife's representatives to recover against the husband's estate, was reversed by the House of Lords, 8 Bligh, n. s. 224, 269. See also *Miller v. Williamson*, 5 Md. 219, 236.

³ *Post*, § 289.

⁴ *Ante*, ch. ix.; *Clawson v. Clawson*, 25 Ind. 229, 231; *Rawson v. Penn. R. R. Co.*, 2 Abb. Pr. n. s. 220; *Savage v. O'Neil*, 44 N. Y. 298; *Beard v. Dedolph*, 29 Wis. 136; *Teague v. Downs*, 69 N. C. 280.

⁵ See *Wms Ex.* and quotations from decided cases, pp. [763]–[770].

America, as with regard to the analogous subjects of pin-money and other allowances by the husband, the statutes of most States contain specific, and in some cases very minute, provisions on the rights of the wife and widow to her paraphernalia, which are considered, in their connection with the estates of deceased persons, in a separate chapter.¹ At common law, gifts as paraphernalia are distinguishable from gifts by the husband for the wife's separate use in this, that she may dispose of the latter absolutely, but can neither give away nor bequeath the former by her will; and that the husband may sell or give them away during his lifetime, but cannot during her life dispose of them by will.² So they are liable, at common law, and in States in which they are not secured to the wife by statutory enactment, for the husband's debts, but not to satisfy the husband's legacies; and where the creditor has a double fund, he has no right to subject the widow's paraphernalia to the satisfaction of his debt; but all other property, whether real or personal, is to be first applied to * the payment of debts.³ And where [* 614] the husband has pledged his wife's paraphernalia, the widow has a right to have them redeemed by the executor or administrator.⁴ Nor are jewels and other gifts in the nature of paraphernalia by third persons, *for her separate use*, liable for the husband's debts.⁵

¹ *Ante*, ch. ix.

² *Wms. Ex.* [766], and authorities.

³ *Ib.*, p. [767] *et seq.*

⁴ *Graham v. Londonderry*, 3 *Atk.* 393.

⁵ See *ante*, § 288.

[* 615]

*CHAPTER XXXI.

TITLE OF EXECUTORS AND ADMINISTRATORS TO CHOSSES IN ACTION.

§ 290. **Survival of Actions at Common Law.**—The ancient rule of the common law, *Actio personalis moritur cum persona*, left only such actions to be brought by the executor or administrator as were founded on some obligation or duty, including debts of all descriptions, with respect to which the executor or administrator is the only representative of the deceased recognized by law, so that no provision in a contract, nor any stipulation or agreement, can transfer to another his exclusive rights derived from such representation.¹ Actions for injuries to the person or property of another, for which damages only could be recovered (tort, malfeasance, misfeasance), or arising *ex delicto* (trespass *de bonis asportatis*, trover, false imprisonment, assault, battery, slander, deceit, diverting a watercourse, obstructing lights, escape, etc.), in which the declaration at common law imputes tort to person or property, and the plea is not guilty, are said to die with the person *by* or *to* whom the wrong was done. This rule was modified by a series of English statutes,² notably that of 4 Edw. III. c. 7, giving an action *in favor of* a personal representative for injuries to personal property, and 3 & 4 Wm. IV. c. 42, § 3, giving an action in favor of personal representatives for injuries to real estate, and *against* personal representatives for injuries to real or personal estate; so that actions are now maintainable by and against executors and administrators in all cases where the value of personal property has been reduced by injury thereto, whatever form of action may be necessary to secure the remedy, and for injury to the real estate, and the damages recovered declared to be personal estate.³ The most important alteration of the law on this

Common-law rule is, that actions not founded on obligation or duty die with the person.

Modified by statutes.

¹ Wms. Ex. [785] *et seq.* "The true test as to survival against an executor was whether the cause of action had its basis in a property right, and necessarily involved the breach of a contract obligation": Stanley v. Vogel, 9 Mo. App. 98, 100; Cregin v. Brooklyn Co., 83 N. Y. 595, 597.

² Mentioned in Wms. Ex. [790] *et seq.*

³ Wentworth, in his work on Executors, thus expresses his opinion that an executor ought to have his action on the statute of Edward III. for grass consumed by the cattle of a trespasser: "When meadow ground which yearly conceiveth (*Sol sine homine generat herbam*) shall be ready to be delivered of her burthen, if a stranger put in a herd of cattle which

subject is that of 9 & 10 Vict. c. 93, amended by 27 & 28 Vict. c. 95, giving an action to executors and administrators for the death of one killed through the wrongful act, neglect, or default of another. Similar statutes have been enacted in most of the American States, and are a fruitful source of lawsuits against railroad and other corporations.¹

§ 291. **Reason of the Rule.**—The accurate and logical import of the rule that *actio personalis moritur cum persona*, seems to be, that for injuries to the person alone, not affecting property of any kind, the remedy ceases upon the death of the doer or sufferer. Legislative enactments, both in England and, with few if any exceptions, in America, spring from a recognition of the maxim in this sense, and the judiciary in both countries, when not controlled by statutory enactment to the contrary, is guided by it in its rulings. The law exacts reparation from the wrongdoer, whether the wrong affects the person or the property of another; it makes compensation by a judgment in favor of the person aggrieved against the aggressor, in a sum of money deemed to be the equivalent of the injury suffered. But, under the artificial common-law system respecting the devolution of property upon the owner's death, there can be no reparation for a wrong done (the remedy for which is an action *ex delicto*) where one of the parties is dead; "for," says Blackstone,² "neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury." Actions arising *ex contractu* were allowed to survive both to and against executors and administrators, "being indeed rather actions against the property than the person, in which the executors have now the same interest that their testator had before."³ So Lord Ellenborough: "Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased but not of their wrongs, except

* where these wrongs operate to the temporal injury of the [* 617] personal estate. . . . Although marriage may be regarded as a temporal advantage to the party as far as respects the personal comforts, still it cannot be regarded as an increase of the individual transmissible estate. . . . Loss of marriage may, under circumstances, occasion a strict pecuniary loss to a woman, but it does not necessarily do so."⁴ In this view no action lies against or by an

swallow up and tread down this fruit of her womb before the mower with his scythe come as a midwife to help her delivery, if then, by the hasty death of the owner before action brought, this great trespass should be dispunishable, it were contrary, as methinks, to the purpose of said statute, and a great defect in the law." Wentw. Ex. 167 (14th ed.).

¹ See *post*, § 295.

² 3 Bla. Comm. 302.

³ *Ibid*.

⁴ *Chamberlain v. Williamson*, 2 M. & Selw. 408. See also *Finlay v. Chirney*, L. R. 20 Q. B. Div. 494, 498; *Sawyer v. Concord Railroad*, 58 N. H. 517; *Jenkins v. French*, 58 N. H. 532.

executor or administrator for a tort committed to one's person, feelings, or reputation.¹

But an injury to property involves a wrong to others beside the immediate sufferer, that is to say, to all who have, from their relation to the owner, an interest in the property; and these, whether personal representatives, heirs, or devisees, are entitled to and have their remedy. Thus, as heretofore mentioned,² personal actions survive in all cases arising *ex contractu*, and by English statutes this is extended to actions for injury to personal or real estate.³ So, although the right to sue on a covenant real descends to the heirs of the covenantee, or goes to his assigns, to the exclusion of his executor or administrator, yet if such covenant had been broken during the lifetime of the covenantee his executor or administrator might sue upon it;⁴ but, on the other hand, though there may have been a formal breach during the ancestor's lifetime, yet, if the substantial damage has taken place since his death, the real and not [* 618] the personal representative is the proper * plaintiff.⁵ On this theory, too, the rule is grounded that no action *ex delicto* can be sustained against an executor or administrator unless the estate in his hands was benefited by the tort;⁶ and the statute of 4 Edward III. c. 7, gives a remedy to the executor of the person injured, but does not extend to the representatives of the wrongdoer.⁷

§ 292. **American Statutes regulating the Survival of Actions.**—The tendency of legislation in America, wherever it diverges from the common-law rule above mentioned, is uniformly in the direction

¹ As for assault, trespass, battery, slander, seduction of a daughter, breach of promise of marriage (unless special damages be alleged: *Chamberlain v. Williams*, *supra*), or like wrongs to the feelings: *Broom's L. M.* * 912; 3 *Bla. Comm.* 302; *Clarke v. McClelland*, 9 *Pa. St.* 128; or for the felonious or negligent killing of a husband, father, or other relative or person: *Wyatt v. Williams*, 43 *N. H.* 102, 105, with numerous authorities; or for injuries affecting the life and health of the deceased, arising out of the unskilfulness of medical practitioners: *Vittum v. Gilman*, 48 *N. H.* 416; *Jenkins v. French*, 58 *N. H.* 532; or for enticing away a servant: *Huff v. Watkins*, 20 *S. C.* 477.

² *Ante*, § 290.

³ The object of these statutes to secure the remedy in this sense is generally expressed in the preamble, e. g.: "And whereas there is no remedy provided by law for injuries to the real estate of any person deceased, committed during his

lifetime, nor for certain wrongs done by a person deceased in his lifetime to another, respecting his property, personal or real, for remedy be it enacted," &c.: 3 & 4 *Wm. IV. c.* 42, § 2. It was held, even before the enactment of this statute, that trespass *de bonis asportatis* lay by an executor for the cutting and carrying away of corn: *Emerson v. Amell*, *Freem.* 22; and for cutting and carrying away trees: *Williams v. Breedon*, 1 *Bos. & Pul.* 329.

⁴ *Com. Dig.* tit. *Covenant*, B. 1.

⁵ *Wms. Ex.* [803] *et seq.*

⁶ *People v. Gibbs*, 9 *Wend.* 29, 34; *Cravath v. Plympton*, 13 *Mass.* 454; *Wilbur v. Gilmore*, 21 *Pick.* 250, 252; *Osborn v. Bell*, 5 *Denio*, 370, 376; *Higgins v. Breen*, 9 *Mo.* 497, 500.

⁷ *Wheatley v. Lane*, 1 *Saund.* (5th *Am.* from last *London* edition) 216 a, note (1), by *Mr. Serjeant Williams*; *Coker v. Crozier*, 5 *Ala.* 369; *Daniel, J.*, in *Henshaw v. Miller*, 17 *How. (U. S.)* 212, 220.

of increasing the liability of tortfeasors and their estates, and correspondingly augmenting the authority of executors and administrators to maintain action for injuries to the person or property of their deceased testators or intestates.¹ Thus actions are expressly given, both to and against executors and administrators, for replevin, for injuries to the person (except libel and slander), for the detention or conversion of personal property, against officers for misfeasance, malfeasance, or nonfeasance either of themselves or their deputies, and in all cases of fraud or deceit, in Illinois,² Maine,³ Massachusetts,⁴ Ohio,⁵ Rhode Island,⁶ and Vermont.⁷ All actions at law whatsoever, except for slander, * libel, and [* 619] trespass, and to recover real estate, survive to and against the personal representatives in Iowa,⁸ Kentucky,⁹ Maryland,¹⁰ Mississippi,¹¹ and Pennsylvania.¹² The statutes enumerate the kinds of actions and the circumstances under which they may be brought

¹ "The ancient strictness of the rule has been constantly giving way before a more enlightened civilization and a more full and perfect development of the principles of natural justice. Judicial expositions of the statutes, which have been passed touching the survivorship of actions and causes of action, seem to have been made in the same liberal spirit which has led to the various enactments. If the language of the statute will allow it, no reason is perceived why such a construction should not be adopted as will give to executors and administrators, for the benefit of heirs or creditors as the law may require, authority to institute or maintain suits for the recovery of such damages as the deceased party, whom they represent, may have suffered in his lifetime, either in his person or his property, by reason of the tortious or other acts of any person, in the same manner as the party injured might have done if living": May, J., delivering the opinion in *Hooper v. Gorham*, 45 Me. 209, 212.

² St. & C. Ann. St. 1896, ch. 3, ¶ 123.

³ The statute mentions replevin, trover, assault and battery, trespass, case, petitions for and actions of review, in addition to common-law remedies: St. 1883, ch. 87, § 8.

⁴ Pub. St. 1882, ch. 165, § 1.

⁵ Mentioning actions for mesne profits, for injuries to real or personal property, for deceit or fraud: Bates' Ann. St. 1897, § 4975.

⁶ Waste, replevin, trover, trespass,

case; but allowing neither vindictive or exemplary damages, nor damages for outraged feelings of the injured party: Pub. St. 1882, ch. 204, §§ 8 *et seq.* Ejectment survives to and against personal or real representative, as the right may descend: *Ib.*, § 11.

⁷ Ejectment or other possessory action, replevin, trover, trespass, case: St. 1895, § 2446; and for a bodily hurt or injury where the party dies pending suit: § 2447.

⁸ With no exception whatever: Code, 1897, § 3443. Special provision that the civil remedy does not merge in the criminal, but may be enforced in addition to the punishment: § 3444.

⁹ Excepting also assault and battery, criminal conversation, and so much of action for malicious prosecution as is intended to compensate for personal injury: St. 1894, § 10.

¹⁰ Specially mentioning actions for illegal arrest, false imprisonment, and for violating certain articles of the declaration of rights and the provisions of the habeas corpus act as surviving: Publ. Gen. L. 1888, art. 93, ¶ 104.

¹¹ All personal actions without any exception whatever, at law or in equity: Ann. Code, 1892, §§ 1916, 1917.

¹² Excepting for wrongs done to the person: Pep. & L. Dig. 1896, p. 1492, § 139. But actions for injuries to the person by negligence or default also survive: *Maher v. Phil. Co.*, 181 Pa. St. 391.

by and against executors and administrators in respect of the rights and liabilities of their testators and intestates, differing in slight degree from the rules above mentioned, in Alabama,¹ Arkansas,² California,³ Delaware,⁴ Kansas,⁵ Missouri,⁶ New Jersey,⁷ New York,⁸ North Carolina,⁹ South Carolina,¹⁰ Virginia,¹¹ and West Virginia.¹² The statutes of Indiana¹³ and Oregon¹⁴ announce the rule literally: "A cause of action arising out of an injury to the person dies with the person of either party," excepting cases in which an action is given for injuries resulting in [* 620] *death, and in Indiana actions for seduction, malicious prosecution, and false imprisonment; all other causes of action survive, except actions for breach of promise to marry. In Minnesota¹⁵ every cause of action survives, whether arising out of contract or not, except for injuries resulting in death. In Georgia no action for a tort abates by reason of the death of either party, where the wrongdoer received any benefit from the tort complained of,¹⁶ but the common-law rule as to the survival of actions is not changed.¹⁷ So in New Hampshire.¹⁸ In Wisconsin, actions to recover personal property, for converting same, for assault and battery, false imprisonment, or other damage to the person, trespass

¹ Code, 1896, §§ 35, 36. All actions upon contract, express or implied, all personal actions except for injuries to the person or reputation, and real actions for title or possession of lands in which personal representatives have an interest.

² For wrongs done to the person or property except slander and libel; ejectment for lands in possession of others upon which the decedent has made improvements under claim of possession by virtue of pre-emption or entry in the land office: Dig. of St. 1894, §§ 5908, 5909.

³ For waste, conversion, trespass, and actions which deceased had against a surviving partner: Code Civ. Pr. §§ 1582-1585.

⁴ For all personal actions except assault and battery, defamation, malicious prosecution or injury to the person, or upon penal statutes: Laws as Amended, 1874, p. 643, § 2.

⁵ In addition to actions surviving at common law, actions for mesne profits, injuries to the person, to real or personal estate, and for deceit or fraud: Gen. St. 1897, p. 214, §§ 420, 421.

⁶ For all wrongs done to the property, rights, or interests of another (except slander, libel, assault and battery, false imprisonment, or actions on the case for

injuries to the person): Rev. St. 1889, §§ 96, 97.

⁷ For trespass to the person or property: Rev. 1895, p. 1496, § 4.

⁸ All actions on contract and to recover debts and effects, and trespass to personal or real property: Banks & Br., 9th ed. (1896), p. 1907.

⁹ All actions except slander (but slander of title survives), libel, false imprisonment, assault and battery, or other injuries to the person not resulting in death, and cases where the relief could not be enjoyed, or granting it would be nugatory after death: Code, 1883, §§ 1490 *et seq.*, § 1497.

¹⁰ Rev. St. 1893, §§ 2319, 2323.

¹¹ Code, 1887, §§ 2655, 2656.

¹² Code, 1891, ch. 85, §§ 19 *et seq.*; see *Martin v. B. & O. R. R.*, 151 U. S. 673, 692.

¹³ Rev. St. 1894, § 282; *Feary v. Hamilton*, 140 Ind. 45.

¹⁴ Code, 1887, § 369.

¹⁵ St. 1878, p. 825, § 1.

¹⁶ Code, 1895, § 3825.

¹⁷ *Brawner v. Sterdevant*, 9 Ga. 69. See *Thompson v. Central Railroad*, 60 Ga. 120.

¹⁸ *Sawyer v. Concord Railroad*, 58 N. H. 517, 519.

de bonis asportatis, and for damages to real and personal property, survive, in addition to those surviving at common law.¹

§ 293. **Actions for Injuries to Property.**—It results from the preceding sections, and from the general rule that personal property descends to executors and administrators, that they alone can sue and be sued upon all personal contracts. The same principle extends to the recovery of specific personal property belonging to the decedent, upon whose death the legal title vests at once in the personal representative; and to the recovery of its value if it has been converted, or of damages for injury thereto. This has been held to include actions in trover,² replevin,³ trespass,⁴ case,⁵ debt for conversion,⁶ and, *a fortiori*, for a conversion after the intestate's death, though before the appointment of the administrator.⁷ So, also, an action against a sheriff for a false return,⁸ and an action by a husband against a carrier for the loss of his wife's services and expenses paid in consequence of injuries received by her through the carrier's negligence;⁹ but all right of action * for the [* 621] loss of her society and its comfort to him dies with him.¹⁰

The reason of the rule holds good also with respect to covenants affecting the realty, but not running with the land, as well as to real covenants running with the land for all breaches during the decedent's lifetime, occasioning special damages. Thus it is said that there is a distinction between a covenant of seisin and right to convey, which are personal covenants not running with the land, because, if not true, there is a breach at once which constitutes a chose in action descending to the executor; and the covenant of warranty and for quiet enjoyment, which are prospective, there being no breach until ouster or eviction, wherefore they run with the land conveyed, descending to the heirs.¹¹ For this reason the action

¹ Sanb. & B. 1898, § 4253.

² *Manwell v. Briggs*, 17 Vt. 176, 181; *Eubanks v. Dobbs*, 4 Ark. 173; *Smith v. Grove*, 12 Mo. 51; *Parrott v. Dubignon*, T. U. P. Charl't. 261; *Jahus v. Nolting*, 29 Cal. 507, 511.

³ *Reist v. Heilbrenner*, 11 Serg. & R. 131; *Halleck v. Mixer*, 16 Cal. 574.

⁴ *Snider v. Croy*, 2 John. 227.

⁵ *Aldrich v. Howard*, 8 R. I. 125.

⁶ *Elrod v. Alexander*, 4 Heisk. 342, 350.

⁷ *Hutchins v. Adams*, 3 Me. 174; *Holbrook v. White*, 13 Wend. 591.

⁸ *Jewett v. Weaver*, 10 Mo. 234; *Paine v. Ulmer*, 7 Mass. 317; *Holbrook v. White*, 13 Wend. 591. But see *infra*, cases holding the contrary, § 294.

⁹ *Cregin v. Brooklyn Co.*, 75 N. Y. 192, 196; *per Simpson, J.*, in *Eden v. Railroad*, 14 B. Mon. 204, 206. So an action by the father for injuries to his minor son: *James v. Christy*, 18 Mo. 162. But in Maryland it is held that an action for the loss of the wife's services and expenses for medical and other attendance on her in consequence of injuries from an assault and battery, survives neither at common law nor under the Maryland statute: *Ott v. Kaufman*, 68 Md. 57, contrasting the Maryland with the New York statute.

¹⁰ *Cregin v. Brooklyn Co.*, 83 N. Y. 595, 597; *Grosse v. Delaware R. R.*, 50 N. J. L. 317.

¹¹ 4 Kent Com. *472; *Hamilton v. Wilson*, 4 John. 72; covenant to pay taxes

for breach of covenant of seisin, or of the right to convey, does not lie by the heirs, but must be brought by the executor or administrator.¹ So the administrator may sue for a breach of covenant to convey land,² or sue a surety on the bond of a covenantor for the payment of rent,³ or maintain replevin for trees wrongfully cut from the testator's land during his lifetime,⁴ and recover damages for injury to the rental value or for trespass, committed upon the land before the death of the owner,⁵ even in an action on the case.⁶ Where the estate of the deceased in the land was not a freehold, so that it descends as a chattel, the executor or administrator may self-evidently bring action of forcible entry and detainer for an entry,⁷ or sue for a trespass committed thereon, either before or after the decedent's death,⁸ or sell or otherwise dispose of the right.⁹ And while it is clear, that, for any injury to lands descending to heirs or devisees after the ancestor's or testator's death, the heirs or devisees alone can sue,¹⁰ and that the executor or administrator [* 622] *can bring no possessory action in such case;¹¹ yet where, under the statute or a testamentary provision, the executor or administrator is put in charge of the real as well as of the personal estate, any action necessary to protect the same against wrongdoers, or to recover damages for injuries thereto, including ejectment for possession, must lie in favor of such executor or administrator.¹² So the action of ejectment is given where land be-

runs with the land, for breach of which the heirs must sue, especially if the substantial breach is after the death: *Hendrix v. Dickson*, 69 Mo. App. 197.

¹ *Hamilton v. Wilson*, *supra*; *Kellogg v. Wilcocks*, 2 John. 1; *Beddoe v. Wadsworth*, 21 Wend. 120, 123; *Burnham v. Lasselle*, 35 Ind. 425; *Watson v. Blaine*, 12 Serg. & R. 131, 138; *Kellogg v. Malin*, 62 Mo. 429; *Grist v. Hodges*, 3 Dev. L. 198, 201.

² *Laberge v. McCausland*, 3 Mo. 585.

³ Such covenant on the part of the surety not running with the land, "for although rent savors of the realty, any warranty or insurance of rent is a purely personal contract": *Walsh v. Packard*, 165 Mass. 189, 191.

⁴ *Halleck v. Mixer*, 16 Cal. 574, 579.

⁵ *Webster v. Lowell*, 139 Mass. 172; *Froust v. Bruton*, 15 Mo. 619; *Griswold v. Met. R. R.*, 122 N. Y. 102; *Marcy v. Howard*, 91 Ala. 133; *Kennerly v. Wilson*, 1 Md. 102; *Haight v. Green*, 19 Cal. 113, 117; *Lake Roland Co. v. Frick*, 86 Md. 259, 269.

⁶ *Howcott v. Warren*, 7 Ired. L. 20;

Howcott v. Coffield, 7 Ired. L. 24; *Ten Eyck v. Runk*, 31 N. J. L. 428, 432; *Upper Appomattox Co. v. Hardings*, 11 Gratt. 1.

⁷ *Winningham v. Crouch*, 2 Swan, 170.

⁸ *Schee v. Wiseman*, 79 Ind. 389.

⁹ *Bowers v. Keesecker*, 14 Iowa, 301.

¹⁰ *Aubuchon v. Lory*, 23 Mo. 99; *Noon v. Finnegan*, 29 Minn. 418; *Sloggy v. Dilworth*, 38 Minn. 179 (holding that the heirs alone are liable for damages resulting from the continuance of a nuisance after the intestate's death); *Ayers v. Dixon*, 78 N. Y. 318, 324 (a breach of covenant after death). *Webb v. Co.*, 161 Pa. St. 623.

¹¹ *Brown v. Strickland*, 32 Me. 174; *Emeric v. Penniman*, 26 Cal. 119; *Burdyn v. Mackey*, 7 Mo. 374; *Peck v. Henderson*, 7 Yerg. 18.

¹² *Noon v. Finnegan*, 32 Minn. 81; *Page v. Tucker*, 54 Cal. 121; *Sanchez v. Hart*, 17 Fla. 507; *Gunther v. Fox*, 51 Tex. 383, 387; *Oury v. Duffield*, 1 Ariz. 509; *Black v. Story*, 7 Mont. 238; *Golding v. Golding*, 24 Ala. 122, 129; *Russell v. Erwin*, 41 Ala. 292, 302; *Sorrell v. Ham*, 9 Ga. 55; *Jennings v. Monks*, 4 Met. (Ky.) 103, 105;

comes assets for the want of sufficient personalty to pay debts,¹ or under license from the probate court.² And on the same principle an action on street assessment is maintainable *against* the executor or administrator, if he is in charge of the property assessed.³

§ 294. **Actions for Injuries to the Person.**— We have seen that actions *ex delicto* for personal injuries by or against executors and administrators can only be brought by virtue of some statutory provision,⁴ and it may be profitable to notice the interpretations put upon some of these statutes by the courts.

Thus, an action for personal injuries to the deceased caused by a defect in the highway was held to survive under the statute of Maine giving actions of "trespass and trespass on the case" to executors and administrators;⁵ so under the statute of Massachusetts mentioning "action of trespass on the case for damage to the person."⁶ Similarly in Vermont,⁷ and in case of injury by reason of a carrier's negligence in Illinois,⁸ Iowa,⁹ and North Carolina.¹⁰ But actions for such injuries are denied to the representatives of the injured person in Florida,¹¹ Maryland,¹² Missouri,¹³ and West Virginia.¹⁴ In

* Wisconsin it was held that so much of an action for dam- [* 623] ages against a telegraph company, for permitting its wires to endanger the highway, as seeks to recover for injury to the person, abates, but so much as is for injury to property, and probably so much as is for expenses of medical attendance, etc., survives.¹⁵ In New York the letting of a house to a tenant, with the knowledge that it was in an unhealthy condition, in consequence whereof the tenant's children sickened, and one of them died, was held, if actionable during the lessor's lifetime, not to survive against his personal representative, being an injury to the person.¹⁶ That the

Barlage v. Railway, 54 Mich. 564, 569; *Greenleaf v. Allen*, 127 Mass. 248. And see *post*, § 337, and authorities there cited, enumerating the States in which the representative has statutory authority over the realty.

¹ *Carruthers v. Bailey*, 3 Ga. 105.

² *Burnell v. Malony*, 36 Vt. 636; *McFarland v. Stone*, 17 Vt. 165. And see *Hall v. Bank*, 145 Mo. 418.

³ *Parker v. Bernal*, 66 Cal. 113.

⁴ *Ante*, §§ 290, 292.

⁵ *Hooper v. Gorham*, 45 Me. 209.

⁶ *Demond v. Boston*, 7 Gray, 544.

⁷ *Eames v. Brattleboro*, 54 Vt. 471, 475.

⁸ *Chicago & E. I. R. R. v. O'Connor*, 119 Ill. 586; *Holton v. Daly*, 106 Ill. 131, 135. So also in case of injuries inflicted

on plaintiff by defendant's cow, the action survives the death of either party: *Wehr v. Brooks*, 21 Ill. App. 115.

⁹ *Kellow v. Central Railway*, 68 Iowa, 470, 481.

¹⁰ *Peebles v. North Carolina Co.*, 63 N. C. 238.

¹¹ *Jacksonville Co. v. Chappell*, 22 Fla. 616.

¹² *Baltimore Co. v. Ritchie*, 31 Md. 191, 198.

¹³ *Stanley v. Vogel*, 9 Mo. App. 98.

¹⁴ *Martin v. B. & O. R. R.*, 151 U. S. 673, 692, citing Virginia and West Virginia cases.

¹⁵ *Randall v. Northwestern Co.*, 54 Wis. 140, 149.

¹⁶ *Victory v. Krauss*, 41 Hun, 533.

action for assault and battery does not survive the death of either party, and abates upon the death of plaintiff, Assault and battery. has been decided in Kentucky,¹ Missouri,² North Carolina,³ Pennsylvania,⁴ and Texas;⁵ but in Tennessee it was held that by force of the statute *all* actions survive except wrongs affecting the character of the plaintiff, and that therefore it was not only the right, but also the duty of the personal representative of a plaintiff in an action for assault and battery to revive the suit after an appeal by the defendant;⁶ and such action likewise survives in Arkansas,⁷ Iowa,⁸ and, it seems, in Wisconsin.⁹ The action for malicious prosecution survives in Vermont under the statute providing that the death of neither party shall defeat an Malicious prosecution. action to recover damages for any bodily hurt or injury, but that the same may be prosecuted by or against the representatives of the deceased party;¹⁰ and likewise in Kentucky, notwithstanding the statutory exception that no action shall survive for "so much of the action for malicious prosecution as is intended to recover for the personal injury."¹¹ But it is held not to survive in Arkansas,¹² California,¹³ * Maryland,¹⁴ and Massachusetts.¹⁵ The action for libel is held not to survive in Massachusetts,¹⁶ but otherwise in Iowa;¹⁷ so of Libel. slander, which does not survive in Georgia,¹⁸ Massachusetts,¹⁹ nor Ohio,²⁰ but does so in Iowa²¹ and in Maine.²² In New York it was held that an action of slander by a firm survives to the living members upon the death of one of them.²³ Seduction is a Seduction. tort to the person, actionable only to the extent of the loss of services, etc., by the person entitled thereto; and is held not to survive under the statute of North Carolina, saving such actions of trespass as are not brought for vindictive damages.²⁴ So held also in Georgia²⁵ and New York.²⁶ But in Iowa, under the statute

¹ *Anderson v. Arnold*, 79 Ky. 370.

² Nor in an action against a constable and his sureties for unnecessary assault, will the action survive against the sureties upon the constable's death: *Melvin v. McVey*, 48 Mo. App. 421.

³ *Hannah v. Railroad Co.*, 87 N. C. 351.

⁴ *Miller v. Umbehower*, 10 S. & R. 31.

⁵ *Harrison v. Moseley*, 31 Tex. 608.

⁶ *Kimbrough v. Mitchell*, 1 Head, 539.

⁷ *Ward v. Blackwood*, 41 Ark. 295, 298.

⁸ *McKinlay v. McGregor*, 10 Iowa, 111.

⁹ *Hiner v. Fond du Lac*, 71 Wis. 74, 82.

¹⁰ *Whitcomb v. Cook*, 38 Vt. 477, 481.

¹¹ *Huggins v. Toler*, 1 Bush, 192.

¹² *Ward v. Blackwood*, 41 Ark. 295, 299.

¹³ *Harker v. Clark*, 57 Cal. 245 (decid-

ing that it does not survive against the wrongdoer).

¹⁴ *Clark v. Carroll*, 59 Md. 180, 182.

¹⁵ *Nettleton v. Dinehart*, 5 Cush. 543.

¹⁶ *Walters v. Nettleton*, 5 Cush. 544.

¹⁷ *Carson v. McFadden*, 10 Iowa, 91.

¹⁸ *Per Lumpkin, J.*, in *Browner v. Sterdevant*, 9 Ga. 69.

¹⁹ *Walters v. Nettleton*, *supra*.

²⁰ *Long v. Hitchcock*, 3 Ohio, 274.

²¹ *Carson v. McFadden*, *supra*.

²² By force of the statute directing the survival of actions on the case: *Nutting v. Goodridge*, 46 Me. 82.

²³ *Shale v. Schantz*, 35 Hun. 622.

²⁴ *McClure v. Miller*, 4 Hawks, 133.

²⁵ *Browner v. Sterdevant*, 9 Ga. 69.

²⁶ *George v. Van Horn*, 9 Barb. 523; *People v. Tioga*, 19 Wend. 73.

providing that no cause of action either *ex delicto* or *ex contractu* abates by the death of either party, if from the "legal nature of the case it can survive," it is held that an action of seduction commenced by the injured party survives on her death to her administrator.¹

Enticing away a servant. The action for enticing away or harboring a servant is, in South Carolina, held to be not in assumpsit on any supposed promise, express or implied, but clearly *ex delicto*, for a wrong done, and does not survive.² In general, the action for

Breach of promise to marry. breach of promise to marry does not survive without allegation of special damages;³ but in North Carolina it is held that such action survives against the executor

Divorce. of the deceased.⁴ As a suit for divorce is a personal action, the death of either party before decree abates the proceedings, and they cannot be continued against the executor of the deceased husband to answer the wife's demand for the allowance of additional counsel fees for services rendered during the husband's lifetime.⁵ It was held in Massachusetts, * that an action sur- [* 625]

Malpractice. vived to the administrator of one whose death was caused by the negligent delivery of poison instead of a harmless medicine, under the statute which provides for the survival of all "actions of tort for assault, battery, imprisonment, or other damage to the person;"⁶ in Michigan an action for malpractice survives against his executors,⁷ and in Indiana, a physician is liable to the husband in damages for malpractice in treating his wife, and if the cause of action arise out of a breach of the contract for skilful treatment, it will survive the wife's death;⁸ but no action survives in whatever form against a physician's executor for malpractice, to recover for injuries to the person,⁹ although the physician's surviving partner may be held.¹⁰ It is also held that such action does not survive in New Hampshire,¹¹ although it be in form assumpsit,¹² and in New York.¹³ In Pennsylvania

Attorney's neglect. an action against an attorney for damages suffered in consequence of his neglect was held not to abate on the defendant's death.¹⁴ The action for deceit or fraudulent representation is held to survive, both to and against executors and administrators, under the statutes of New

¹ Shafer v. Grimes, 23 Iowa, 550.

² Huff v. Watkins, 20 S. C. 477, 480.

³ So held in Massachusetts: Smith v. Sherman, 4 Cush. 408, 412; Stebbins v. Palmer, 1 Pick. 71, 78; Chase v. Fitz, 132 Mass. 359. In Maine: Hovey v. Page, 55 Me. 142. In Pennsylvania: Lattimore v. Simmons, 13 Serg. & R. 183. New York: Wade v. Kalbfleisch, 58 N. Y. 282. See ante, § 291.

⁴ Shuler v. Millsaps, 71 N. C. 297.

⁵ McCurley v. McCurley, 60 Md. 185.

⁶ Norton v. Sewall, 106 Mass. 143.

⁷ Norris v. Judge, 100 Mich. 256.

⁸ Long v. Morrison, 14 Ind. 595.

⁹ Boor v. Lowrey, 103 Ind. 468.

¹⁰ Hess v. Lowrey, 122 Ind. 225.

¹¹ Vittum v. Gilman, 48 N. H. 416.

¹² Jenkins v. French, 58 N. H. 532.

¹³ Best v. Vedder, 58 How. Pr. 187.

¹⁴ Miller v. Wilson, 24 Pa. St. 114, 122.

York,¹ Missouri,² and North Carolina;³ in Alabama, the remedy is given in such case *to*, but not *against*, the personal representative;⁴ in Georgia, it is doubted whether the remedy survives to the plaintiff's, but is held not to survive against the defendant's executors,⁵ while in Massachusetts⁶ and Virginia⁷ it abates with defendant's death. In Missouri, it was held that, where one fraudulently induced another to marry him, he having then a lawful wife living, an action in assumpsit lies, for the value of the labor performed by her while believing she was his wife, against the wrongdoer's administrator;⁸ but in New York it was held that an action for damages does not survive in such case.⁹

It appears from a previous statement,¹⁰ that in some instances [* 626] actions for false return by an officer have been held to survive, on the ground that the plaintiff's property right was thereby violated. But in most States such or like actions are held to abate and not to survive against or to executors and administrators. Thus an action does not lie against or by an executor or administrator for the false return of a sheriff,¹¹ nor for the nonfeasance of a deputy,¹² or of a constable.¹³ So it was held in Vermont that an action against a director of a national bank for neglect of duty abates at his death, and cannot be revived against his representatives.¹⁴ Actions against the trustees or other officers of a manufacturing corporation for the recovery of a penalty imposed by statute, for the omission to report, or for otherwise violating the law, does not survive the death of the defendant,¹⁵ or plaintiff.¹⁶ In Missouri, the prosecution for the violation of a city ordinance abates by the death of the defendant, and cannot be revived.¹⁷ And so the rule that *qui tam* actions on penal statutes do not survive prevails in the federal courts, even in States allowing violations of penal statutes to be prosecuted after the

Misfeasance or
malfeasance of
officers.

Violation of
ordinance of
a city.

Qui tam
actions.

¹ Haight v. Hayt, 19 N. Y. 464, 467, 474; so a cause of action for a conspiracy to cheat and defraud the intestate: Brackett v. Griswold, 103 N. Y. 425, 428.

² Baker v. Crandall, 78 Mo. 584.

³ Arnold v. Lanier, Car. Law Rep. 143.

⁴ In analogy with the statute of 4 Edw. III. c. 7; Coker v. Crozier, 5 Ala. 369.

⁵ Newsom v. Jackson, 29 Ga. 61.

⁶ Cutting v. Tower, 14 Gray, 183; Read v. Hatch, 19 Pick. 47. But in Cutter v. Hamlen, 147 Mass. 471, it is held that an action for deceit in letting a dwelling-house infected with a contagious disease, thereby causing an injury to the person, survives against the defendant's executor.

⁷ Henshaw v. Miller, 17 How. (U. S.) 212, 224.

⁸ Higgins v. Breen, 9 Mo. 497, 500.

⁹ Price v. Price, 75 N. Y. 244.

¹⁰ Ante, § 293.

¹¹ Valentine v. Norton, 30 Me. 194, 201; Barrett v. Copeland, 20 Vt. 244.

¹² Cravath v. Plympton, 13 Mass. 454.

¹³ Logan v. Barclay, 3 Ala. 361; Gent v. Gray, 29 Me. 462. So the administrator is the proper party to sue for property exempt illegally taken under execution: Staggs v. Ferguson, 4 Heisk. 690.

¹⁴ Witters v. Foster, 26 Fed. Rep. 737.

¹⁵ Stokes v. Stickney, 96 N. Y. 323; Diversey v. Smith, 103 Ill. 378, 385; Mitchell v. Hotchkiss, 48 Conn. 9.

¹⁶ Brackett v. Griswold, 103 N. Y. 425.

¹⁷ Carrollton v. Rhomberg, 78 Mo. 547, 549.

Actions for
infringing
copyright.

offender's death.¹ But actions for the infringement of a copyright survive against the representative of the offending party.²

§ 295. **Actions for Injuries resulting in Death** do not lie at common law, as already indicated.³ But in England and most of the American States actions are authorized by statute for the wrongful act, neglect, or default of any person or corporation resulting in the death of the person injured. Such actions are now given, for instance, in Alabama,⁴ Arkansas,⁵ Connecticut,⁶ California,⁷ * Delaware,⁸ Florida,⁹ Georgia,¹⁰ Illinois,¹¹ Indiana,¹² Iowa,¹³ [* 627] Kansas,¹⁴ Kentucky,¹⁵ Maine,¹⁶ Maryland,¹⁷ Massachusetts,¹⁸ Michigan,¹⁹ Minnesota,²⁰ Missouri,²¹ Nebraska,²² Nevada,²³ New Hampshire,²⁴ New Jersey,²⁵ New York,²⁶ North Carolina,²⁷ North Dakota,²⁸ Ohio,²⁹ Oregon,³⁰ Pennsylvania,³¹ Rhode Island,³² South Carolina,³³ South Dakota,³⁴ Texas,³⁵ Tennessee,³⁶ Vermont,³⁷ Vir-

¹ *Schreiber v. Sharpless*, 110 U. S. 76.

To similar effect, holding that the action given to a common informer to recover from the owner of a building in which money was lost by gaming, does not survive against the representatives of the defendant: *Yarter v. Flag*, 143 Mass. 280.

² *Atterbury v. Gill*, 2 Flip. 239.

³ *Ante*, § 290; *Connecticut Co. v. New York Co.*, 25 Conn. 265, 272.

⁴ Code, 1896, § 11.

⁵ *Little Rock & F. S. Railway Co. v. Townsend*, 41 Ark. 382, 387.

⁶ Gen. St. 1888, §§ 1008 *et seq.*

⁷ Code Civ. Pr., § 377.

⁸ Laws as amended 1874, p. 644, § 2.

⁹ *Duval v. Hunt*, 34 Fla. 85.

¹⁰ Code, 1895, § 3828.

¹¹ St. & C. Ann. St. 1896, p. 2155, ¶ 1.

¹² *Burn's Ann. St.* 1894, § 285.

¹³ *Worden v. Humeston R. R.*, 72 Iowa, 201.

¹⁴ Gen. St. 1897, § 418.

¹⁵ St. 1894, § 6. In this State the neglect must be wilful, "implying actual malice, or anti-social recklessness" of such nature that contributory negligence on the part of the person injured is no defence: *Louisville R. R. v. McCoy*, 81 Ky. 403, 411, 413.

¹⁶ Rev. St. 1883, ch. 51, § 68. *Laws*, 1891, ch. 124.

¹⁷ Pub. Gen. L. 1888, art. 67, p. 1020.

¹⁸ Pub. St. 1882, ch. 112, § 212.

¹⁹ How. St. 1882, §§ 8313, 8314.

²⁰ Gen. St. 1891, § 5578. In this State an action lies against a steamboat by name for the wrongful killing of the administrator's intestate: *Boutiller v. Steamboat*, 8 Minn. 97.

²¹ Rev. St. 1889, § 4425.

²² Comp. St. 1891, ch. 21 (p. 399).

²³ Gen. St. 1885, § 3898.

²⁴ Pub. St. 1891, ch. 191, § 12.

²⁵ Rev. 1895, p. 1188.

²⁶ Code Civ. Pr., §§ 1902 *et seq.*

²⁷ *Best v. Kinston*, 106 N. C. 205.

²⁸ Code, 1895, §§ 5974 *et seq.*

²⁹ *Wolf v. Railway*, 55 Oh. St. 517; *Russell v. Sunbury*, 37 Oh. St. 372.

³⁰ *Putnam v. So. P. Co.*, 21 Oreg. 230.

³¹ *Deni v. Pa. R. R.*, 181 Pa. St. 525, (holding that the benefit of the statute does not extend to the non-resident alien mother of the person killed).

³² Gen. L. 1896, p. 807, § 14; see *Lubrano v. Mills*, 19 R. I. 129.

³³ Rev. St. 1893, §§ 2315 *et seq.*

³⁴ *Belding v. Railway Co.*, 3 S. D. 369.

³⁵ Rev. St. 1895, art. 3017 *et seq.*

³⁶ The statute of Tennessee provides that the right of action of a person dying from injuries received, or in consequence of the wrongful act or omission of another shall not abate or be extinguished by his death, but shall pass to his personal representative for the benefit of his widow and next of kin, free from the claims of

³⁷ St. 1894, §§ 2451, 2452.

ginia,¹ Washington,² West Virginia,³ Wisconsin,⁴ and Wyoming.⁵ In Michigan the remedy given by statute⁶ against municipal corporations for neglecting to keep highways and bridges in repair, is held to survive to the personal representative of the person injured; and if an executor fails to bring an action, the probate court may appoint an administrator *de bonis non* to do so, although the executor has been discharged.⁷

The action is in all of these States intended for the benefit of the widow; in most of them for the benefit of the widow, children, or next of kin,⁸ or for the widow and next of kin;⁹ in some, [* 628] for the husband, widow, and heirs;¹⁰ in others, if there * be no widow, to children,¹¹ or half to the widow and half to the children,¹² or to be distributed among wife, husband, parent, and child.¹³ In some of the States the action may be brought by the widow, husband, parent, or other person entitled to the proceeds;¹⁴ but generally the suit is brought by the personal representative for the benefit of the persons named in the statute, not as representing the estate in such cases, but the persons for whose benefit the remedy is given.¹⁵ Hence the amount recovered is not assets in the hands of the executor or administrator;¹⁶ if the persons for whose

creditors: *Fowler v. N. R. R.*, 9 Heisk. 829, 830. The amendment of 1871, giving the right of action to the widow, and if none, to the children or personal representatives, was held to apply to an action commenced before it went into effect: *Collins v. E. Tenn. R. R.*, 9 Heisk. 841. Where the wife's death is caused, the surviving husband is entitled to all damages recovered, to the exclusion of the wife's next of kin: *R. R. v. Johnson*, 97 Tenn. 667.

¹ Code, 1887, §§ 2903 *et seq.* It makes no difference that the fund was received by compromise and no judgment was obtained: *Powell v. Powell*, 84 Va. 415.

² Code, 1896, § 4106.

³ Code, 1891, p. 725.

⁴ Sanb. & B. 1898, § 4253.

⁵ Rev. St. 1887, §§ 2364 *a*, 2364 *b*.

⁶ Pub. Acts, 1887, p. 345, act. 264.

⁷ *Merkle v. Bennington*, 68 Mich. 133, 146.

⁸ So in Alabama, Indiana, and Kansas.

⁹ In Arkansas, Illinois, Nebraska, New Jersey, New York, and Vermont.

¹⁰ In Connecticut, Nevada, Rhode Island, South Carolina, Texas, and Wisconsin. So also in Kentucky, where, however, the word "heirs" has been construed to mean "children," excluding

collaterals: *Jordan v. Cin., &c. R.*, 89 Ky. 40.

¹¹ Georgia.

¹² New Hampshire.

¹³ Virginia and West Virginia. In Ohio for the wife or husband and children; if none, for the parents and next of kin, the jury determining the amounts: *Wolf v. Railway*, 55 Oh. St. 517.

¹⁴ For instance, in Kentucky, Missouri, and Pennsylvania.

¹⁵ *Munro v. Dredging Co.*, 84 Cal. 515, 528; *Hicks v. Barrett*, 40 Ala. 291; *Little Rock Railway v. Townsend*, 41 Ark. 382, 387; *Perry v. St. Joseph Railroad Co.*, 29 Kans. 420, 422; *Baker v. Railroad*, 91 N. C. 308; *Stuber v. McGentie*, 142 N. Y. 200; *Wolf v. Railway*, 55 Ohio St. 517. But as to the law of Oregon see *Putnam v. So. Pac. Co.*, 21 Oreg. 230, 233.

¹⁶ See authorities in preceding note. But the administrator is liable for the misapplication of such funds to the parties for whose benefit the suit was brought: *Perry v. Carmichael*, 95 Ill. 519, 530. In Minnesota, funeral expenses, duly allowed, and demands for the support of deceased incurred in consequence of, or after, the injuries causing death, are to be deducted and paid: *State v. Probate Court*, 51 Minn. 241.

Damages recovered are not assets.

benefit the action is authorized are not in existence, the statutes of Virginia and West Virginia provide that the amount recovered shall be assets; but elsewhere it is

held that in such case the action does not lie.¹ Whether such action is property, or *bona notabilia* so as to support a grant of administration on a non-resident's estate when there is no other property, is considered in a previous chapter.² In some of the States it is held that the husband has no action for the killing of his wife.³ In Arkansas,⁴ Indiana,⁵ Minnesota,⁶ New York,⁷ Ohio,⁸ Pennsylvania,⁹

No action survives against wrong-doer's representative.

and Texas,¹⁰ the statute is construed as abating the action by the death of the defendant, and that no action survives *against* the representatives of the wrongdoer. It

is held that the administrator has the power, without the order of the probate court, to compromise a suit for the killing of his intestate; the right to sue involves the right to control the disposition of the suit.¹¹

Attention may be called to the distinction between statutes giving a cause of action to the representative for injuries suffered by his intestate or testator during his lifetime, and such as give an action founded on his death, or on the damages resulting from his death to the widow, next of kin, or other person in whose favor the action is given.¹² The measure of damages is furnished in the former case by

¹ Russell v. Sunbury, 37 Oh. St. 372, 376; Railway Co. v. Lilly, 90 Tenn. 563, with a list of cases cited; Western U. T. Co. v. McGill (C. C. A.), 57 Fed. R. 699, 701, and cases cited. In Alabama it seems that in such cases nominal damages only can be recovered: James v. Richmond R. R., 92 Ala. 281.

² Ante, § 205.

³ Georgia R. R. Co. v. Winn, 42 Ga. 331; see also cases cited in Western U. T. Co. v. McGill, 57 Fed. R. (C. C. A.) 699.

⁴ Davis v. Nichols, 45 Ark. 358, holding that the action in favor of the widow and next of kin abates by the defendant's death, but not the action in favor of the estate.

⁵ Hamilton v. Jones, 125 Ind. 176.

⁶ Green v. Thompson, 26 Minn. 500.

⁷ Hegerich v. Keddle, 99 N. Y. 258, overruling Yertore v. Wiswall, 16 How. Pr. 8.

⁸ Russell v. Sunbury, 37 Oh. St. 372, 376.

⁹ Moe v. Smiley, 125 Pa. St. 136.

¹⁰ Johnson v. Farmer, 89 Tex. 610.

¹¹ Washington v. L. & N. R., 136 Ill. 49; Parker v. P. S. Co., 17 R. I. 376; so where the widow is given the right of action, she may compromise the claim,

though the benefits go partially to her children: Natchez v. Mullins, 67 Miss. 672; Holder v. Railroad, 92 Tenn. 141; but where the administrator brings the suit for the benefit of the widow and children, the widow alone cannot effect a compromise: Railroad v. Acuff, 92 Tenn. 26; nor, in some States, where the administrator has the sole right to sue, can the beneficiaries make a binding compromise, but only the administrator: Yelton v. R. R., 134 Ind. 414; while in others the beneficiaries, at least before suit brought by the administrator, may release the person liable: Sykora v. Case, 59 Minn. 130; and it is held that a stranger cannot compromise such a claim, though he be afterwards appointed administrator, so as to estop him as administrator from subsequently bringing the suit: Stuber v. McEntee, 142 N. Y. 200. In Ohio the administrator by statute may compromise, with the consent of the court appointing him: Rev. St. § 6135.

¹² Such statutes are frequently found coexisting: see, for instance, Rev. St. Mo. §§ 2121, 2122; Belding v. Railway Co., 3 S. Dak. 369.

the loss and suffering of the deceased party caused by the injury up to the time of his death; while in the latter case death is the cause of action, and the damages are measured by the loss to the person in whose interest the action is brought in consequence of [* 629] such death.¹ In some of the States, the amount * recoverable for the death of a person is determined by statute,² or not to exceed a maximum stated.³ It is also held that the common-law doctrine of merger of a civil action in a felony does not apply.⁴ It is held under some of the statutes that when the injured brings suit and recovers damages in his lifetime, and his death afterwards results from the injury, his personal representatives cannot maintain an action.⁵ Under a statute of Connecticut providing that "actions for injuries to the person, whether the same do or do not result in death, shall survive to the executor or administrator," it was doubted whether an action can be maintained for instantaneous killing; but where the death is not instantaneous, punitive damages may be recovered.⁶ In some States the personal representative cannot maintain an action for an instantaneous killing.⁷ In Tennessee, whose statute does not distinguish between the cause of action given to the party injured, or his representatives, and that given to those who were damaged by his death, it is held that damages may be awarded not only for the mental and bodily suffering, expenses, and loss of time resulting to the deceased, but also for the loss and deprivation resulting to the parties for whose benefit the right of action survives.⁸

It may be noticed, also, that an action against husband and wife for the wife's wrong abates with her death.⁹

The authorities are conflicting on the question whether statutes creating this right of action have extra-territorial validity. It is well recognized that penal statutes will not be enforced beyond the limits of the State having enacted them,¹⁰ but that "whenever, by either the common law or the statute law of a State, a right of

¹ *Needham v. Grand Trunk Co.*, 38 Vt. 294, 302. See also *Munro v. Dredging Co.*, 84 Cal. 515, 523; *Davis v. Railway*, 53 Ark. 117, 126.

² For instance, in Missouri, the only amount that can be recovered is \$5,000, neither more nor less: Rev. St. § 2121.

³ As in Virginia, where it cannot exceed \$10,000: Code, 1887, § 2903; same in West Virginia: Code, 1887, p. 709, § 6; and Ohio: Rev. St. § 6135.

⁴ *Lankford v. Barrett*, 29 Ala. 700.

⁵ *Hecht v. R. R.*, 132 Ind. 507 and cases cited; *Littlewood v. Mayor*, 89 N. Y. 24; *Legg v. Britton*, 64 Vt. 652.

⁶ *Murphy v. New York R. R. Co.*, 29 Conn. 496.

⁷ *Railroad Co. v. Pendergrass*, 69 Miss. 425, and cases cited from other States.

⁸ *Nashville Railroad v. Prince*, 2 Heisk. 580, 587 (overruling *Louisville Railroad v. Burke*, 6 Coldw. 45, 49), approved in later cases, notably in that of *Collins v. East Tennessee Railroad*, 9 Heisk. 841, 850.

⁹ *Roberts v. Lisenbee*, 86 N. C. 136.

¹⁰ *Herrick v. Minneapolis R. R. Co.*, 31 Minn. 11, 13; *Adams v. Railroad*, 67 Vt. 76 (construing the Massachusetts statute); *Dale v. R. R. Co.*, 57 Kan. 601.

action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties.”¹ Hence, where a statute gives a right of action to a personal representative for the death of the intestate, an administrator appointed in another State is held entitled to maintain the action in such State.² But, on the other hand, it is * held [* 630] that an administrator cannot maintain an action under the statute of another State authorizing an action by the personal representative of one who came to his death by the default of another;³ nor in the State giving the action, if the injury was committed elsewhere.⁴ But in States recognizing the authority of foreign administrators to sue, a foreign administrator may maintain such an action in the State where the injury occurred and the right of action exists.⁵ It is sometimes emphasized that such statutes only of other States will be enforced as are not against the policy of the State in which the remedy is sought; and that the similarity or coincidence of statutes in the two States is indicative of the coincidence of their policy.⁶ So, although a foreign administrator may in general maintain a suit in a State recognizing the authority of foreign administrators, yet he will not be permitted to maintain an action for injuries resulting in death, if he has not the authority to bring such action in the State under which he holds his appointment,⁷ since the action cannot be maintained if it is not given where the injury was inflicted.⁸ In some States it is held that the action for an injury inflicted in an-

¹ *Dennick v. R. R. Co.*, 103 U. S. 11, 18; *Stoeckman v. Terre Haute R. R. Co.*, 15 Mo. App. 503, 506; *Boyce v. Wabash R. R. Co.*, 63 Iowa, 70, 72; *Burns v. Grand R. R. Co.*, 15 N. East. (Ind.) 230, 231; *Evey v. Mex. Cent.* 81 Fed. (C. C. A.) 294.

² *Dennick v. R. R. Co.*, *supra*; *Herrick v. Minneapolis R. R. Co.*, 31 Minn. 11, 15; *Selma R. R. Co. v. Lacey*, 49 Ga. 106, 111; *Missouri Pacific Railway v. Lewis*, 24 Neb. 846; *Higgins v. R. R.*, 155 Mass. 176.

³ *Woodard v. Michigan R. R. Co.*, 10 Oh. St. 121; *Richardson v. New York Central R. R. Co.*, 98 Mass. 85, 92; *McCarthy v. Chicago R. R. Co.*, 18 Kans. 46; *Taylor v. Pennsylvania R. R. Co.*, 78 Ky. 348.

⁴ *Whitford v. Panama R. R. Co.*, 23 N. Y. 465, 467; *Needham v. Grand Trunk R. R. Co.*, 38 Vt. 294, 310; *Hover v. Pennsylvania Co.*, 25 Oh. St. 667; *Davis v. N. Y. & N. E. R. R.*, 143 Mass. 301; *De Harn v. Railway*, 86 Tex. 68.

⁵ *Kansas Pac. R. Co. v. Cutter*, 16 Kans. 568; *Jeffersonville R. R. Co. v. Hendricks*, 41 Ind. 48, 72; *Hartford R. R. Co. v. Andrews*, 36 Conn. 213; *Marvin v. Co.*, 49 Fed. R. 436; *Memphis Co. v. Pikey*, 142 Ind. 304.

⁶ *Chicago R. R. Co. v. Doyle*, 60 Miss. 977, 983; *Leonard v. Columbia Co.*, 84 N. Y. 48, 52; *Morris v. Chicago R. R. Co.*, 65 Iowa, 727, 731; *Railway Co. v. Richards*, 68 Tex. 375, 378; *Vawter v. Missouri R. R. Co.*, 84 Mo. 679, 684; *Ash v. B. & O. R. R.*, 72 Md. 144; *Burns v. Grand R. R. Co.*, 15 N. East. R. (Ind.) 230. To divest the jurisdiction of the federal court the dissimilarity must be such as to conflict with the settled public policy of the State in which the action is brought: *Evey v. Mex. Cent.* 294.

⁷ *Limekiller v. Hannibal R. R. Co.*, 33 Kans. 83, 88.

⁸ *Hamilton v. Han. & C. R. R.*, 39 Kans. 56; *Louisville & M. R. R. v. Williams*, 113 Ala. 402.

other State must be brought by the person to whom the right to sue is given in such other State;¹ while in a federal court it was held that where by the law of the State where the cause of action accrues the administrator may maintain the action for the benefit of the next of kin, he may sue in a foreign State in which the action is given to the widow direct, on the theory, it seems, that he is, in such case, rather an express trustee for the beneficiaries than a personal representative of the deceased;² but ordinarily a foreign administrator cannot sue, unless permitted by statute.³

§ 296. **Property conveyed by Decedent in Fraud of Creditors.**

— At common law and under English statutes⁴ the transfer of property in fraud of the rights of creditors is void as to them, but good and binding between the parties thereto.

The same principle is embodied in the American statutes, from which it follows that, as the representative of a decedent, the executor or administrator cannot impeach the conveyance of his testator or intestate on the ground of fraud.⁵ But the personal representative

Transfer of property in fraud of creditors valid between the parties, but void as to creditors.

representative of the creditors; hence, although he is never allowed to recover the property from the fraudulent grantee for the benefit of the heir or devisee,

[* 631] *because they are equally bound with the grantor, yet he may consistently do so in favor

is also the

Executors and administrators may in some States recover from fraudulent donee in favor of creditors.

of creditors of an insolvent estate. Provision is therefore made by statute, in some of the States, enabling executors and administrators of insolvent estates to recover property fraudulently conveyed by their testators or intestates, and the property so recovered becomes assets for the payment of debts; and in some States it is so held in the absence of a statute to that effect. It is, accordingly, held that the personal representative may recover property fraudulently conveyed by the decedent, if it be necessary to pay his debts, in Arizona,⁶ California,⁷ Connecticut,⁸ Indiana,⁹ Iowa,¹⁰ Loui-

¹ *Asher v. R. R.*, 126 Pa. St. 206; see also *Wooden v. W. R. R.*, 126 N. Y. 10, 16. So in New Jersey it is held that though under the New Jersey statute the administrator must sue, yet where the cause of action arises in Pennsylvania where the widow must sue, no action can be maintained by a New Jersey administrator: *Lower v. Segal*, 59 N. J. L. 66.

² *Wilson v. Tootle*, 55 Fed. R. 211.

³ *Maysville Co. v. Wilson*, 16 U. S. App. 236.

⁴ Particularly 13 Eliz. c. 5.

⁵ *Bump on Fraud. Conv.*, ch. 16. See collection of authorities on this point, p. 445 (3d ed.).

⁶ Rev. St. Ariz. 1887, § 1192.

⁷ *Forde v. Exempt Fire Co.*, 50 Cal. 299, 302.

⁸ *Andruss v. Doolittle*, 11 Conn. 283, 287; *Minor v. Mead*, 3 Conn. 289; *Booth v. Patrick*, 8 Conn. 106; *Freeman v. Burnham*, 36 Conn. 469; *Bassett v. McKenna*, 52 Conn. 437.

⁹ *Martin v. Bolton*, 75 Ind. 295. The administrator *de bonis non* may maintain an action to set aside a fraudulent conveyance by his predecessor of property bought with trust funds: *Duffy v. Rogers*, 115 Ind. 351.

¹⁰ *Cooley v. Brown*, 30 Iowa, 470.

siana,¹ Maine,² Massachusetts,³ Michigan,⁴ Minnesota,⁵ Montana,⁶ Nebraska,⁷ Nevada,⁸ New Hampshire,⁹ New York,¹⁰ North Carolina,¹¹ North Dakota,¹² Ohio,¹³ Oklahoma,¹⁴ Pennsylvania,¹⁵ South Dakota,¹⁶ Tennessee,¹⁷ Vermont,¹⁸ Washington,¹⁹ and Wisconsin,²⁰ principally upon the theory that in insolvent estates the administrator represents the creditor. In most of these States, when the administrator refuses to bring such action, and the estate proves insufficient to pay the debts, creditors may bring suit themselves, making the representative a party defendant,²¹ or object to the settlement of an estate as insolvent, alleging the existence of property fraudulently conveyed,²² while in others it is held that a creditor cannot maintain the bill; if the administrator refuses to do so, after an offer of proper indemnity, he should be removed and another appointed.²³

¹ *Sullice v. Gradenigo*, 15 La. An. 582; *Judson v. Connolly*, 4 La. An. 169.

² *McLean v. Weeks*, 61 Me. 277, 280; *Brown v. Whitmore*, 71 Me. 65; *Frost v. Libby*, 79 Me. 56.

³ *Martin v. Root*, 17 Mass. 222, 228; *Holland v. Cruft*, 20 Pick. 321, 328; *Chase v. Redding*, 13 Gray, 418; *Welsh v. Welsh*, 105 Mass. 229; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Yeomans v. Brown*, 8 Met. (Mass.) 51, 56.

⁴ How. St. 1882, § 5884. The defendant should be permitted, on payment of the claims against the estate and the costs of proceeding to retain the land subject to the widow's dower right: 109 Mich. 128.

⁵ St. Minn. 1884, § 4506.

⁶ Code Mont. 1895, § 2738.

⁷ St. 1887, ch. 23, §§ 211-213.

⁸ St. Nev. 1885, § 2871.

⁹ *Cross v. Brown*, 51 N. H. 486; *Abbott v. Tenney*, 18 N. H. 109; *Preston v. Cutter*, 64 N. H. 461.

¹⁰ *McKnight v. Morgan*, 2 Barb. 171; *Bate v. Graham*, 11 N. Y. 237, 240, 242; *Brownell v. Curtis*, 10 Pai. 210, 218; *Lichtenberg v. Herdifelder*, 103 N. Y. 302, 306; so also where there is an apparent lien by a fraudulent mortgage, or even where the mortgage on record has been forged: *National Bank v. Levy*, 127 N. Y. 549, 553.

¹¹ Code, 1883, §§ 1446, 1447.

¹² Rev. Code N. D. 1895, § 6480.

¹³ *McCall v. Pixley*, 48 Oh. St. 379; *Doney v. Clark*, 55 Oh. St. 294.

¹⁴ Rev. St. Okl. 1893, § 1390.

¹⁵ *Stewart v. Kearney*, 6 Watts, 453;

Pringle v. Pringle, 59 Pa. St. 281; *Bouslough v. Bouslough*, 68 Pa. St. 495, 499.

¹⁶ Dak. Terr. Laws, 1887, § 5868.

¹⁷ *Pitt v. Poole*, 91 Tenn. 70.

¹⁸ *McLane v. Johnson*, 43 Vt. 48, 60. Before the statute to this effect, the administrator's authority was denied: *Peaslee v. Barney*, 1 Chip. 331, 334; *Martin v. Martin*, 1 Vt. 91, 95.

¹⁹ Code, Wash. 1896, § 5455.

²⁰ Sanb. & B. Ann. St. 1889, § 3832. As soon as the administrator is satisfied of the fact that there is a deficiency of assets, it is his duty to bring an action to recover property fraudulently conveyed, even before the exact amount is ascertained: *Andrew v. Hinderman*, 71 Wis. 148, 150.

²¹ *Harvey v. McDonnell*, 113 N. Y. 526, holding that the plaintiff need not be a judgment creditor; see also *Tuck v. Walker*, 106 N. C. 285, 289; *Ohm v. Superior Court*, 85 Cal. 545, holding that only a judgment creditor can sue; followed in *Murphy v. Clayton*, 114 Cal. 662 (where the executor was the fraudulent grantee); and in Tennessee the creditor need not join the representative: *Pitt v. Poole*, 91 Tenn. 70, 73, citing earlier cases; *Allen v. McRae*, 91 Wis. 226 (the creditor may sue whenever there is reason to apprehend an insufficiency of assets); *Rutherford v. Alyea*, 54 N. J. Eq. 411 (holding that one who was not a judgment creditor and had not presented his claim for allowance could not maintain the action).

²² *Cray v. Wright*, 16 Ind. App. 258.

²³ *Putney v. Fletcher*, 148 Mass. 247.

In Ohio it is held that where the fraudulent grantee has conveyed the real estate to an innocent purchaser the administrator of an insolvent estate may maintain an action against the fraudulent grantee for the value of the land.¹

In other States the creditor is driven for his remedy to a court of chancery, because the executor or administrator is not permitted to assail or impeach the acts of his testa-

tor or intestate. It is so held in Alabama,²

[* 632] Arkansas,³ Florida,⁴ Georgia,⁵ Illinois,⁶ * Kentucky,⁷ Maryland,⁸ Mississippi,⁹ Missouri,¹⁰

North Carolina,¹¹ Ohio,¹² Rhode Island,¹³ South Carolina,¹⁴ Tennessee,¹⁵ Texas,¹⁶ and Virginia.¹⁷

But in other States the personal representative cannot impeach the acts of his testator or intestate.

¹ Doney v. Clark, 55 Oh. St. 294.

² Marler v. Marler, 6 Ala. 367; Walton v. Bonham, 24 Ala. 513; Davis v. Swanson, 54 Ala. 277; and in a proper case a receiver will be appointed: Werborn v. Kahn, 93 Ala. 201.

³ Eubanks v. Dobbs, 4 Ark. 173.

⁴ Holliday v. McKinne, 22 Fla. 153, 168, 176.

⁵ Beale v. Hall, 22 Ga. 431, 457.

⁶ Harmon v. Harmon, 63 Ill. 512; Eads v. Mason, 16 Ill. App. 545, 548; White v. Russell, 79 Ill. 155; Majorowicz v. Payson, 153 Ill. 484.

⁷ Commonwealth v. Richardson, 8 B. Mon. 81, 93.

⁸ Kinnemon v. Miller, 2 Md. Ch. 407; Dorsey v. Smithson, 6 Har. & J. 61, 63.

⁹ Armstrong v. Stovall, 26 Miss. 275, 277; Winn v. Barnett, 31 Miss. 653, 659; Blake v. Blake, 53 Miss. 182, 193.

¹⁰ McLaughlin v. McLaughlin, 16 Mo. 242; Brown v. Finley, 18 Mo. 375; George v. Williamson, 26 Mo. 190.

¹¹ Coltraine v. Causey, 3 Ired. Eq. 246.

Subsequent to this case a statute authorizing the recovery by an administrator of all property fraudulently conveyed, and such real estate as descends at law to the heirs, and only such as would have been liable to execution or attachment by a creditor of the grantor in his lifetime. It was held under this statute, that lands which a debtor paid for and caused to be conveyed to his son, to defeat his creditors, could not after his death be recovered by his administrator: Rhem v. Tull, 13 Ired. L. 57.

¹² So held formerly: Benjamin v. Le Baron, 15 Ohio, 517 (Birchard, J., dissenting); but now changed by statute,

authorizing the executor or administrator to recover such lands, if needed for the payment of debts: Bates' Ann. St. 1897, §§ 6139, 6140. But the action must be brought in the common pleas court: Spoors v. Coen, 44 Oh. St. 497.

¹³ Estes v. Howland, 15 R. I. 127.

¹⁴ King v. Clarke, 2 Hill (S. C.), Ch. 611; Chappell v. Brown, 1 Bai. 528, 531; Anderson v. Belcher, 1 Hill (S. C.), L. 246, 248. But in this State, as in some others, the administrator may be made a party to a proceeding in equity at the suit of creditors, and the property will be recovered and distributed to creditors by the chancery court: Thomson v. Palmer, 2 Rich. Eq. 32; and the personal representative is a necessary party: Sheppard v. Green, 48 S. C. 165. But it seems that where the administrator is himself a creditor he may impeach a conveyance by his intestate: Winsmith v. Winsmith, 15 S. C. 611; Werts v. Spearman, 22 S. C. 200, 215.

¹⁵ Lassiter v. Cole, 8 Humph. 621; Sharp v. Caldwell, 7 Humph. 415; Moody v. Fry, 3 Humph. 567. But contra: Marr v. Rucker, 1 Humph. 348.

¹⁶ The decisions in this State are not pointed. Connell v. Chandler, 13 Tex. 5, Cobb v. Norwood, 11 Tex. 556, Avery v. Avery, 12 Tex. 54, 57, and Willis v. Smith, 65 Tex. 656, 658, deny the power of the administrator to recover; while it is intimated that the administrator is the proper party to sue to set aside the fraudulent conveyance for the benefit of creditors in Danzey v. Smith, 4 Tex. 411, and Hunt v. Butterworth, 21 Tex. 133, 141.

¹⁷ Backhouse v. Jett, 1 Brock. 500, 507; Thomas v. Soper, 5 Munf. 28. See Spooner v. Hilbich, 92 Va. 333.

As in other cases, there must be an exhaustion of the personalty before real estate fraudulently conveyed can be sold to pay the fraudulent grantor's debts,¹ and the proceeds of such sale, whether on suit by a creditor or by the executor or administrator, become assets for the payment of debts only.² In an early case the excess over the amount necessary to pay the debts was held to be distributable to the next of kin or legatees, as an incident to the administration;³ but the true rule is to restore such excess to the fraudulent grantee,⁴ because the fraudulent conveyance is good between the parties thereto and their representatives, binding all persons but creditors.⁵

* In a number of States the creditor having recovered such [* 633] property by proceedings after the debtor's death, in a court of chancery, has a prior claim thereon for the payment of his debt.⁶ So it is held that the plaintiff in a creditor's action commenced in the debtor's lifetime, acquires a lien upon the choses in action and equitable assets which gives him a right of priority to payment thereout, which is not displaced by the death of the debtor before judgment.⁷

§ 297. **Annuities and Rent Charges.**—An annuity is defined to be a yearly payment of a certain sum of money granted to another for life, or for a term of years, and charged upon the person of the grantor only. When charged upon real estate, it is most commonly called a rent charge.⁸ As personal property, an annuity passes to the personal representative; but if granted *with words of inheritance* it is descendible and goes to the heir, to the exclusion of the executor.⁹ The apportionability of annuities is mentioned elsewhere.¹⁰

Dividends upon shares in a corporation bequeathed to the testator's widow for life, declared after her death for a period which expired during her life, are included in the be-

¹ *Clement v. Cozart*, 107 N. C. 695; *Field v. Andrada*, 106 Cal. 107; *Rutherford v. Duryea*, 54 N. J. Eq. 411.

² *McCall v. Pixley*, 48 Oh. St. 379, 388; *Danzey v. Smith*, *supra*; *Lee v. Chase*, 58 Me. 432, 436; *Cross v. Brown*, 51 N. H. 486, 488; *Welsh v. Welsh*, 105 Mass. 229.

³ *Martin v. Root*, 17 Mass. 222, 228.

⁴ *McLean v. Weeks*, 61 Me. 277, 280; *Bank of United States v. Burke*, 4 Blackf. 141, 143.

⁵ *Burtch v. Elliott*, 3 Ind. 99; *Rochelle v. Harrison*, 8 Port. 351.

⁶ *Bank of United States v. Burke*, 4

Blackf. 141, 143; *George v. Williamson*, 26 Mo. 190.

⁷ *First Nat'l Bank v. Shuler*, 135 N. Y. 163, 171.

⁸ Abb. Law Dict., tit. Annuity.

⁹ As where a testator gave his real and personal estate to his wife, subject to an annuity of £50 to A. B. *forever*; it was held that, for the want of the word *heirs* in the gift, the annuity passed, on the death of A. B., to his personal representatives: *Taylor v. Martindale*, 12 Sim. 158; *Parsons v. Parsons*, L. R. 8 Eq. Cas. 260.

¹⁰ *Post*, §§ 301, 459.

quest, and her executor may recover them.¹ This subject, so far as the same affects the relative rights of legatees for life and remaindermen² in stock dividends³ is discussed in connection with the satisfaction of legacies by the executor.

§ 298. **Apprentices and Servants.** — Upon the death of a master, both his servants and apprentices are discharged, and therefore the executor or administrator of the former can bring no action to enforce the contract of service after his death; nor do they take any interest in an apprentice bound to the deceased,⁴ unless the infant, with the consent of the father, had bound himself by indenture to a tradesman, *his executors and administrators*, such executors or administrators carrying on the same trade or business.⁵ In Vermont it is held that the indenture of apprenticeship is not necessarily avoided by the death of the master, but becomes voidable merely; and if [* 634] *the apprentice serve the administrator of the deceased master, he acquires the rights and incurs the duties of an apprentice to him.⁶

Servants and apprentices are discharged by the master's death,

unless they have bound themselves to one and his executors and administrators, and these carry on the trade.

§ 299. **Copyrights and Patents.** — The right of an author to the exclusive sale or use of his intellectual productions, including books, maps, charts, pamphlets, magazines, engravings, prints, dramatic and musical compositions, paintings, drawings, photographs, sculpture, models, busts, and designs, and the right of inventors originating any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement therein, are species of property unknown at common law, and of purely statutory origin, both in England and America. For the encouragement and development of learning and literature, and to promote the progress of useful arts and sciences, Congress has secured to the author or inventor the absolute and indefeasible interest and property in his literary production or the subject of his invention for a specified time, which, upon certain conditions, may be extended for a further term of years. During this period the law has impressed upon these productions all the qualities and characteristics of property, has enabled the author or inventor to hold and deal with the same as property of any other description, and on his death it passes, with the rest of his personal estate, to his legal representatives, becoming part of his assets.⁷ The patent may be applied for and obtained by

Copyrights and patents are, in America, personal property going to the executor or administrator.

¹ *Johnson v. Bridgewater Manufacturing Company*, 14 Gray, 274.

² *Post*, § 456.

³ *Post*, § 457.

⁴ *Wms. Ex.* [813, 814]; 3 Redf. on Wills, 287, pl. 38.

⁵ *Wms. Ex.* [816], citing *Cooper v. Simmons*, 7 H. & N. 707.

⁶ *Phelps v. Culver*, 6 Vt. 430. See on the subject of apprentices in America, *Woerner on Guardianship*, § 47, p. 159.

⁷ *Wilson v. Rousseau*, 4 How. (U. S.) 646, 674; *Dudley v. Mayhew*, 3 N. Y. 9.

the executor or administrator, and is then vested in him not as part of the general assets of the estate, but in trust for the heirs or devisees, "in as full and ample a manner, and under the same conditions, limitations, and restrictions, as the same was held, or might have been claimed or enjoyed, by the inventor in his or her lifetime."¹ It is obvious, that an extension of the term of letters patent and copyright may likewise be granted to and held by the personal representatives;² and in such case the assignee of the patentee under the original patent acquires no right under the extended patent, unless such right be expressly conveyed to him by the patentee.³ The right of personal representatives to sell or

* assign a copyright or patent follows from its quality as [* 635] property, and may be made by one of two or more administrators.⁴ Action for infringement of a patent may be brought by the administrator, and where a moiety has been assigned by the patentee he may sue, in conjunction with the surviving assignee;⁵ and he may commence his action in the United States Circuit Court of another State without qualifying as administrator in such State; and the same right extends to the assignee of the administrator.⁶ Where, in a suit for the infringement of a patent right, the defendant dies before the granting of a decree, a bill of revivor may be filed against the decedent's personal representative.⁷

The analogous subject of trade-marks is governed by similar principles, and the authority of personal representatives with reference thereto is much the same as with reference to copyrights and patents.⁸ Paxson, J., passing upon the question of the right of heirs or distributees to use the trade-mark of the ancestor,⁹ says that, while the cases are not uniform on this subject, there is ample and recent authority that a business and accompanying trade-mark may pass from parent to children without administration; and that the business may be divided among the children, and each will have the right to the trade-mark to the exclusion of all the world except the co-heirs. He quotes from the opinion of Lord Cranworth,¹⁰ who argued that, when a manufacturer dies, those

¹ Curtis's Law of Patents, § 177; Stimpson v. Rogers, 4 Blatchf. 333. Goodyear v. Hulihan, 3 Fish. 251, 254.

² Washburn v. Gould, 3 Story, 122; Brooks v. Bicknell, 3 McLean, 250; also 432.

³ Woodworth v. Sherman, 3 Story, 171; Wilson v. Rousseau, *supra*, McLean and Woodbury, JJ., dissenting, holding that the extension would enure to those assignees who had by express agreement secured an interest in the extension.

⁴ Wintermute v. Redington, 1 Fisher,

239; Brooks v. Bicknell, *supra*, 438; Pitts v. Jameson, 15 Barb. 310, 316.

⁵ Story, J., *arguendo*, in Whittemore v. Cutter, 1 Gall. 429, 431.

⁶ Smith v. Mercer, 3 Pa. Law Jour. Rep. 529, 533 (b. p. 448).

⁷ Kirk v. Du Bois, 28 Fed. Rep. 460.

⁸ Browne on Trade-Marks, § 365, 1st ed.

⁹ Pratt's Appeal, 117 Pa. St. 401, 413.

¹⁰ Leather Cloth Co. v. American Co., 11 H. L. 523, 534.

who succeed him (grandchildren or married daughters, for instance), though not bearing the same name, yet ordinarily use the original name as a trade-mark, and will be protected against infringement of the exclusive right to that mark because, according to the usages of trade, they would be understood as meaning, by the use of their grandfather's or father's name, no more than that they were carrying on the manufacture formerly carried on by him. So *Field, J.*, in *Kidd v. Johnson*, 100 U. S. 617, 620.¹

[* 636] *§ 300. **Rents.** — The general rule is, that rents accruing after the deceased owner's death belong to the heirs or devisees, as an incident to the ownership of the land which descends to them.² According to this principle, the payment of rent to an executor or administrator under a lease from him after the testator's or intestate's death

Rents accruing after deceased owner's death go to heirs.

is no discharge as against the heirs,³ and may be recovered by them even if the estate is insolvent, unless there has been some action to subject the land to the power of the executor or administrator.⁴ The right of the heirs attaches to rents accruing under a leasehold extending beyond the lessor's life, if there be a reversion to himself and his heirs;⁵ but if a lessee for years make an underlease, reserving rent, such rent accruing after his death goes to the executor or administrator, because his estate was but a chattel interest.⁶

But if the real estate is necessary to pay the debts of the deceased, the executor or administrator may be ordered to take possession of it and collect the rents therefrom, and, if these are insufficient, to sell the same,⁷ or, in

Unless needed to pay debts of deceased.

¹ The reason why a trade-mark may pass "without administration," as suggested by *Paxson, J.*, *supra*, seems to be that a trade-mark can have no value except in connection with the business to which it attaches; and as creditors are not usually in condition to realize the value of the trade-mark, either by carrying on the business themselves or by selling to one who will, its chief element as an asset is wanting. But it seems, also, that cases may arise in which the trade-mark of a deceased testator or intestate is of value to creditors, or a subject of contention between heirs, when administration may become necessary.

² See *post*, § 513; *Ball v. First National Bank*, 80 Ky. 501, 503, and earlier cases cited; *McClead v. Davis*, 83 Ind. 263; *Stewart v. Smiley*, 46 Ark. 373; *Crane v. Guthrie*, 47 Iowa, 542, 545; *Shouse v. Krusor*, 24 Mo. App. 279; *Le Moyne v. Harding*, 132 Ill. 23; *Dexter v. Hayes*, 88 Iowa, 493.

³ *Haslage v. Krugh*, 25 Pa. St. 97.

⁴ *Kimball v. Sumner*, 62 Me. 305; *Brown v. Fessenden*, 81 Me. 522; *Towle v. Swasey*, 106 Mass. 100; *Gibson v. Farley*, 16 Mass. 280; *Clift v. Moses*, 44 Hun, 312, 314. The same principle is applicable to the damages due for land taken for a railroad: *Boynton v. Peterborough Company*, 4 Cush. 467; *Campbell v. Johnston*, 1 Sandf. Ch. 148; and to damages for cutting down trees: *Fuller v. Young*, 10 Me. 365, 372; *Smith v. Bland*, 7 B. Mon. 21.

⁵ *Markel's Estate*, 131 Pa. St. 584, 611; *Stinson v. Stinson*, 38 Me. 593; *Foltz v. Prouse*, 17 Ill. 487, 493; *Bloodworth v. Stevens*, 51 Miss. 475.

⁶ *Wms. Ex.* [818]; 3 Redf. on Wills, 183, pl. 8.

⁷ On this subject, see *post*, §§ 463 *et seq.*, treating of the liability of real estate for the debts of deceased persons.

some States, even take possession thereof without the order of court.¹ It will appear hereafter, in connection with the subject of the duties of executors and administrators in respect of real

Except in States where the real estate descends to the executor or administrator.

estate,² that in a * number of States the distinction between real and personal property has been abolished, so that both go to the personal representative for administration. In such States the rents self-evidently go to the executor or administrator during the period of administration. [* 637]

It is also clear, that, where the real estate is devised to an executor for purposes of administration, the rents must be paid to the person administering.³

Rents which had accrued prior to the death of the testator or intestate are mere choses in action, and therefore payable to the personal representative.⁴

The subject of the personal representative's liability for rents is more fully treated later.⁵

§ 301. Apportionment between Life Tenant and Remainderman.

— If a lessor make a lease of land of which he owns part in fee and part for a term of years, reserving one entire rent for the whole, the rent accruing after his death will be apportioned between

No apportionment of rent between successive owners at common law.

the heir and the executor.⁶ But at common law there could be no apportionment of rent accruing to successive owners, so that, if a life tenant died before the rent reserved under a lease made by him became due, the

rent was lost both to his executor and to the reversioner, — to the former, because no rent had become due to the testator when he died; to the latter, because he was not the lessor of the tenant.⁷ To remedy this difficulty, the statute of 11 Geo. II. c. 19, § 15, was enacted, providing that where any tenant for life died before the time at which rent reserved under a demise from him, determining with his death, became due, the executor or administrator of the lessor might recover from the under-tenant the proportion of rent which had accrued at the time of the lessor's death.⁸ Similar statutes exist in many of the American States, referring generally, like

¹ "If the estate is insolvent, and settled in the insolvent course, it is the duty of the administrator to take possession of it, take care of it, and take the rents and profits": *Lucy v. Lucy*, 55 N. H. 9, 10; *Bergin v. McFarland*, 26 N. H. 533, 536. The law in most other States, however, requires some order of the probate court to divest the heirs of the right of possession.

² *Post*, § 337.

³ *Glacius v. Fogel*, 88 N. Y. 434, 444, as where by the will he is charged with

the collection of all rents: *McDowell v. Hendrix*, 71 Ind. 286.

⁴ *McDowell v. Hendrix*, 67 Ind. 513, 517; *King v. Anderson*, 20 Ind. 385; *Logan v. Caldwell*, 23 Mo. 372; *Bealey v. Blake*, 70 Mo. App. 229; *Ball v. First National Bank*, 80 Ky. 501; *Parker v. Chestnutt*, 80 Ga. 12.

⁵ *Post*, § 513.

⁶ 3 Redf. on Wills, 183, pl. 9; *Wms. Ex.* [818], citing English authorities.

⁷ *Wms. Ex.* [821], with authorities.

⁸ *Stillwell v. Doughty*, 3 Bradf. 359.

the British statute, to leases from life tenants, expiring with the life of the lessor. Where the lease is by a tenant in fee, or in any case where it is binding upon the heir or person entitled in remainder,

the lessee is bound to pay the rent, the whole of which will [* 638] then go to the heir or remainderman, no matter how much * of it was earned before his estate took effect in possession.¹

The same rule with reference to apportionment applies to annuities; they are not in their nature apportionable either in law or equity,² except annuities for the maintenance of the widow, or married women living apart from their husbands, or infants, in which case they are apportionable on the ground of necessity.³ But there is a distinction to be drawn between an annuity, no part of which is payable unless the annuitant live until it becomes due, and the accruing interest upon a given sum producing an income, in which case the beneficiary is entitled to all the interest earned at the time of his death.⁴ The subject is also regulated by statute in several States,⁵ and will again be referred to in connection with satisfaction of legacies.

Nor of annuities, except when given for maintenance of widow or minor children.

Aliter as to interest.

¹ 3 Redf. on Wills, 184, pl. 12; *Fay v. Holloran*, 35 Barb. 295; *Sohier v. Eldredge*, 103 Mass. 345, 351; *Bloodworth v. Stevens*, 51 Miss. 475. But where a lessee under a life tenant pays the rent to the representative of the life tenant for a period subsequent to the lessor's death, the reversioners may recover therefor: *Price v. Pickett*, 21 Ala. 741.

² *Tracy v. Strong*, 2 Conn. 659, 664; *Waring v. Purcell*, 1 Hill (S. C.), Ch. 193, 199; *Wiggin v. Swett*, 6 Met. (Mass.) 194, 201; *McLemore v. Blocker*, Harp. Eq. 272, 275; *Manning v. Randolph*, 4 N. J. L. 144; *Heizer v. Heizer*, 71 Ind. 526; *Dexter v. Phillips*, 121 Mass. 178.

³ *Gheen v. Osborn*, 17 Serg. & R. 171; *Fisher v. Fisher*, 5 Pa. L. J. Rep. 178; *Ex parte Rutledge*, Harp. Ch. 65; *Gould, J.*, in *Tracy v. Strong*, *supra*; *Blight v. Blight*, 51 Pa. St. 420; *Earp's Appeal*, 28 Pa. St. 368, 374; *Dexter v. Phillips*, 121 Mass. 178, 180; *Lackawanna Iron Co.'s Case*, 37 N. J. Eq. 26; *per Clark, J.*, in *Quinn v. Madigan*, 65 N. H. 8.

⁴ Because interest becomes due *de die in diem*: *Story Eq. Jurisp.*, § 480, note (p. 469 of 12th ed.). As there is no difficulty in making apportionment, there is no necessity for the rule: *Earp's Appeal*, *supra*; and so it has been held that, where no period or day has been mentioned

upon which the annuity should be paid, the rule that annuities cannot be apportioned is not applicable: *Reed v. Cruikshank*, 46 Hun, 219; but on appeal this doctrine was held to be inconsistent with the authorities and the case reversed: *Kearney v. Cruikshank*, 117 N. Y. 95, 100. Dividends from profits on business of incorporated companies are not only contingent, but uncertain in amount until the expiration of the full period for which they are declared, and are not apportionable: *Granger v. Bassett*, 98 Mass. 462, 469; *Foote, Appellant*, 22 Pick. 299; *Sweigart v. Berk*, 8 S. & R. 299, 302; *Quinn v. Madigan*, 65 N. H. 8.

⁵ *Kearney v. Cruikshank*, 117 N. Y. 85; *Weston v. Weston*, 125 Mass. 268. In Massachusetts it was held that, under the statute of that State, where a testator had directed a residue in trust to be sold and invested in a particular security, the income to be paid as an annuity to his son's widow during her life and on her death to provide for her children, the life tenant was entitled to the proceeds of coupons of bonds representing the fund maturing after the testator's death; and upon the death of the life tenant, the interest was to be apportioned: *Sargent v. Sargent*, 103 Mass. 297.

§ 302. **The Wife's Choses in Action.**—At common law, marriage is a qualified gift to the husband of the wife's choses in action, upon condition that he reduce them to possession during its continuance. If he die before his wife, without having reduced such property into possession, *she, and not his executors or administrators, [* 639] will be entitled to it.¹ There is a distinction, however, in some of the States at least, between choses in action which accrued to the wife before, and those which accrued to her during coverture; for the latter the husband may bring action in his own name, disagree to the interest of his wife, and a recovery thereon in his own name is sufficient to defeat the wife's survivorship.² *What amounts to a reduction into posses- [* 640]

¹ *Hair v. Avery*, 28 Ala. 267, 273; *Rice v. McReynolds*, 8 Lea, 36; *Lockhart v. Cameron*, 29 Ala. 355; *Moody v. Hemphill*, 75 Ala. 268; *Andover v. Merriamack Co.*, 37 N. H. 437, 444; *Burr v. Sherwood*, 3 Bradf. 85; *Arnold v. Ruggles*, 1 R. I. 165, 178; *Bell v. Bell*, 1 Ga. 637; *Killcrease v. Killcrease*, 7 How. (Miss.) 311; *Barber v. Slade*, 30 Vt. 191; *Stephens v. Beal*, 4 Ga. 319, 323; *Sterling v. Sims*, 72 Ga. 51; *Weeks v. Weeks*, 5 Ired. Eq. 111, 120; *Lenderman v. Lenderman*, 1 Houst. 523; *Baker v. Red*, 4 Dana, 158; *Willis v. Roberts*, 48 Me. 257, 261; *Kellar v. Beelor*, 5 T. B. Monr. 573; *Whitehurst v. Harker*, 2 Ired. Eq. 292; *Goodwin v. Moore*, 4 Humph. 221; *Walden v. Chambers*, 7 Oh. St. 30; *Bone v. Sparrow*, 11 La. An. 185; *Pinkard v. Smith*, Little's Sel. Cas. 331; *Rogers v. Bumpass*, 4 Ired. Eq. 385.

² *Boozar v. Addison*, 2 Rich. Eq. 273. In Connecticut it is held, as the settled law of the State, that a chose in action accruing to the wife during coverture vests absolutely in the husband: *Fourth Ecclesiastical Society v. Mather*, 15 Conn. 587, 598, reciting numerous authorities. In Massachusetts the decisions are conflicting; the cases of *Albee v. Carpenter*, 12 Cush. 382, *Commonwealth v. Mauley*, 12 Pick. 173, *Goddard v. Johnson*, 14 Pick. 352, and *Hapgood v. Houghton*, 22 Pick. 480, distinctly holding, the first two that a chose in action accruing to the wife during coverture vests absolutely in the husband, the other two that he may bring suit thereon in his own name *after her death*; while in *Hayward v. Hayward*, 20 Pick. 517, which seems to have been

well argued and thoroughly considered, it is deliberately announced that, if the husband die before reducing into possession a chose in action accruing to the wife during coverture, it survives to the wife. In Maine, *Willis v. Roberts*, 48 Me. 257, Maryland, *Bond v. Conway*, 11 Md. 512, Rhode Island, *Wilder v. Aldrich*, 2 R. I. 518, and Tennessee, *Cox v. Scott*, 9 Baxt. 305, 310, it is expressly held that such choses survive to the wife, if the husband die before reducing them to possession. In Delaware it was so decided, although the husband had made an equitable assignment of his wife's chose, but died before it was reduced to possession: *State v. Robertson*, 5 Harr. 201. In New York a distinction was taken between an action which must be brought in the name of the husband and wife, which, unless the husband obtained satisfaction, would survive to the wife, and one which the husband might bring in his own name; and it was held that taking a new security, or novating the debt to the wife in his own name, authorized him to bring suit thereon in his own name, and destroyed the wife's right of survivorship: *Searing v. Searing*, 9 Pai. 283. Where a suit for the wife's choses in action is brought in chancery, it is necessary to join the wife, and the court will then see that the husband make a suitable provision for the wife, unless she consents to waive it: *Schuyler v. Hoyle*, 5 Johns. Ch. 196, 210, reviewing the English authorities. So in Missouri: *Pickett v. Everett*, 11 Mo. 568; and in this State it is held that in a suit for choses accruing to the wife during coverture the husband

sion by the husband is a question of much nicety and difficulty, upon which the authorities are by no means precise, nor the rules in the several States uniform.¹ The mere intention, without some act divesting the wife's right and making his own absolute, — such as a judgment recovered in an action commenced by him in his own name alone, or an award of execution to him upon a judgment recovered by him and his wife, or the receipt of the money, or decree for payment to him or for his use, — is not sufficient to defeat her survivorship.² It has been held that he may sell or assign her choses for a valuable consideration, and thus defeat her right,³ although the choses assigned be no further reduced to possession during coverture;⁴ but he cannot make a voluntary assignment or gift of them without consideration unless the assignment or gift be consummated by actual reduction during coverture.⁵ So the assignment of the wife's choses as a collateral for the husband's debt simply puts the assignee in the husband's place; it is not of itself a reduction into possession, and if the husband die before anything further is done, neither the assignee nor the husband's personal representatives have any further interest therein.⁶ An assignment by an insolvent husband for the benefit of his creditors, under the insolvent law, will defeat her right, although he die before her;⁷ but a general assignment, without referring to the wife's choses in action, does not include [* 641] *them, nor is the assignee of a bankrupt under the bank-

The mere intention of the husband is not sufficient to divest the wife's ownership.

He may sell or assign for valuable consideration.

Vendee takes place of the husband, and must reduce to possession before husband's death.

may at his election join his wife or not; and if he sues alone and recovers judgment, it is an election to have the chattel in his own right freed from the right of survivorship in the wife; if he joins her in the suit, her right of survivorship will continue: *Leakey v. Maupin*, 10 Mo. 368, 372. In Ohio, choses in action belonging to the wife at the time of the marriage, not reduced into possession by means of a judgment obtained during coverture in the husband's name alone, or by assignment for a valuable consideration, or by taking new securities in his name alone, survive to the wife, and on her death before the husband's go to her heirs: *Dixon v. Dixon*, 18 Ohio R. 113.

¹ *Chitty on Contr.* 225; *Snowhill v. Snowhill*, 2 N. J. Eq. 30, 36.

² *Brown v. Bokee*, 53 Md. 155, 169.

³ *Hill v. Townsend*, 24 Texas, 575; *Abington v. Travis*, 15 Mo. 240. "The assignment availed to pass the right to the

assignee to collect and have the proceeds as his absolute property, if collected during the coverture, just as the husband might have done if he had kept and reduced it into possession himself": *O'Connor v. Harris*, 81 N. C. 279, 282.

⁴ *Browning v. Headley*, 2 Rob. (Va.) 340.

⁵ *Hartman v. Dowdel*, 1 Rawle, 279, 281; *Siter's Case*, 4 Rawle, 468.

⁶ *Hartman v. Dowdel*, *supra*; *Latourette v. Williams*, 1 Barb. 9; *Croft v. Bolton*, 31 Mo. 355.

⁷ *Richwine v. Heim*, 1 Pa. Rep. 373; *Shuman v. Reigart*, 7 W. & S. 168. But in New York the creditors in such case take subject to the wife's right by survivorship if the husband dies before the assignee has reduced such property to possession: *Van Epps v. Van Deusen*, 4 Pai. 64, 73; and see *Williams v. Sloan*, *infra*.

rupt act entitled to them, the rule of the common law being that creditors cannot compel the husband to exercise his power in their favor.¹ The assertion of title to the wife's chose in action by a bequest in the husband's will cannot affect rights which she had otherwise been permitted to retain;² so the mere manual possession of a note or other chose in action payable to the wife is not sufficient to constitute a reduction by the husband so as to divest the wife's right;³ nor holding it as administrator, before final distribution.⁴ But where the husband is the executor of a will under which the wife is entitled to a legacy, taking it and mingling it with his other property is a reduction of it to possession such as bars her right thereto.⁵ So, where the husband receives the legacy from the executor, receipting for it in his wife's name and using the money as his own,⁶ the possession must come to the husband in the exercise of his marital right, and for the purpose of appropriating it to his own use.⁷ An assignment by the husband of a reversionary interest expectant on the death of a tenant for life is not valid against the wife, if both she and the life tenant survive the husband.⁸ Nor is a contract made between husband and wife during *coverture, [* 642] disposing of the wife's expectancies, binding on the wife after the husband's death.⁹ And an agreement made before mar-

¹ Gibson, C. J., in *Shay v. Sessaman*, 10 Pa. St. 432, 433; *State v. Robertson*, 5 Harr. 201; *Timbers v. Katz*, 6 W. & S. 290, 298, 299; *Terry v. Wilson*, 63 Mo. 493, 499; *Williams v. Sloan*, 75 Va. 137.

² *Grebill's Appeal*, 87 Pa. St. 105, 108.

³ *Latourette v. Williams*, *supra*; *Burr v. Sherwood*, 3 Bradf. 85. So the possession by a husband of his wife's distributive share of her father's estate, where the executor has not qualified, does not constitute an exercise of his marital right, the title being in the executor; and on the husband's death the title to the property survives in the wife: *Hairston v. Hairston*, 2 Jones Eq. 123, 127.

⁴ *Johnson v. Brady*, 24 Ga. 131, 136; *Crawford v. Brady*, 35 Ga. 184, 192; *Walker v. Walker*, 25 Mo. 367. So an administrator, having in his hands the distributive share of an estate belonging to a married woman, who is summoned as trustee in an action against her husband, will be discharged if the husband die before judgment: *Strong v. Smith*, 1 Met. (Mass.) 476.

⁵ *Bridgman v. Bridgman*, 138 Mass. 58.

⁶ *Rice v. McKeynolds*, 8 Lea. 36.

⁷ *Tennison v. Tennison*, 46 Mo. 77. If

he take them as trustee for the wife, creditors of the husband cannot subject them to the payment of their debts: *Terry v. Wilson*, *supra*. So where a wife collects insurance money on her house, and reinvests it in real estate, her husband assenting to her control and disposition of the money: *Cox v. Scott*, 9 Baxt. 305.

⁸ Because the defeasance of the wife's right by survivorship depends upon the actual conversion by the husband during coverture, and this is impossible of an interest which exists only in expectancy. See a thorough discussion of this question by Ryland, J., in *Wood v. Simmons*, 20 Mo. 363, in which the view of Sir Thomas Plumer, Master of the Rolls, in *Purdew v. Jackson*, 1 Russ. Ch. 1, is quoted with approval, viz.: that all assignments by the husband of the wife's choses in action pass them *sub modo*, on condition that the assignee receive his share, or its value, during the life of the husband. *Moore v. Thornton*, 7 Gratt. 99, 110; *Browning v. Headley*, *supra*; and if in such case the wife die before the life tenant, her interest will pass to her children: *Matheney v. Guess*, 2 Hill (S. C.), Ch. 63.

⁹ *Hardin v. Smith*, 7 B. Monr. 390, 392.

riage, stipulating that the wife's equities and expectancies should be settled on her, will be regarded as constituting a trust in the husband, which will prevent his marital rights from ever attaching.¹ Where the husband survives the wife, he is entitled to administer on her estate,² and, as such administrator, to all her personal estate remaining in action or unrecovered at her death; but if he die before obtaining a grant of administration, or, having taken letters, before all her property in action is reduced to possession, such property does not go to his representatives, but administration, general or *de bonis non*, must be obtained on her estate for that purpose;³ and in such case the wife's representatives hold the property in trust for the husband's next of kin or legatees,⁴ subject, of course, to the wife's debts.⁵ But it is to be remembered that recent legislation in most of the States has greatly changed the law with reference to the property rights of married women,⁶ and that in many cases choses in action of the wife not reduced by the husband during her lifetime now go, upon her death, to her next of kin, in the same manner as if she had been a *feme sole*.⁷

Wife's administrator *de bonis non* is entitled to her choses in preference to the representatives of the husband who died before completing administration on her estate.

[* 643] *§ 303. **Actions accruing to the Representative, Officially or Individually.** — It results from the ownership of all personal property of a deceased person, which by law is placed in the executor or administrator, that for any injury thereto occurring after the decedent's death, and before the final disposition to the parties entitled, the action must be brought, as we have seen, by the per-

Cause of action arising after death gives the action to the personal representative.

But a post-nuptial settlement upon the wife, if not fraudulent, is good in her favor: *Picquet v. Swan*, 4 Mason, 443; *Duffy v. Insurance Co.*, 8 W. & S. 413,

¹ *Ramsay v. Richardson*, Riley, Ch. 271, 273. Ante-nuptial contracts intended to regulate and control the interest which each of the parties to the marriage shall take in the property of the other during coverture or after death, will be enforced according to the intention of the parties: *Johnston v. Spicer*, 107 N. Y. 185; *Desnoyer v. Jordan*, 27 Minn. 295; *Forwood v. Forwood*, 86 Ky. 114; and see *ante*, § 287, p. * 608, note.

² *Ante*, § 236.

³ *Allen v. Wilkins*, 3 Allen, 321; *Burleigh v. Coffin*, 22 N. H. 118, 125; *Curry v. Fulkerson*, 14 Ohio R. 100; *Hunter v. Hallett*, 1 Edw. Ch. 388; *Cobb v. Brown*, Speers, Eq. 564; *Hendren v. Colgin*, 4 Munf. 231, 234; *Lee v. Wheeler*, 4 Ga.

541; *Rice v. Thompson*, 14 B. Monr. 377; *Templeman v. Fontleroy*, 3 Rand. 434, 439; *Olmsted v. Keyes*, 85 N. Y. 593, 602; *Robins v. McClure*, 100 N. Y. 328, 334; *Brown v. Bokee*, 53 Md. 155, 163; *Glasgow v. Sands*, 3 G. & J. 96, 103; *Chadsey v. Fuller*, 6 Mackey, 117. And the administrator may maintain trover for their conversion: *Brown v. Bokee*, *supra*.

⁴ *Bryan v. Rooks*, 25 Ga. 622; *Stewart v. Stewart*, 7 Johns. Ch. 229, 246; *Hunter v. Hallett*, *supra*; *Donnington v. Mitchell*, 2 N. J. Eq. 243. If the husband intermeddles without taking letters of administration, he will be held liable for her debts: *Lockwood v. Stockholm*, 11 Pai. 87.

⁵ *Clay v. Irvine*, 4 W. & S. 232; *Lockwood v. Stockholm*, *supra*.

⁶ See *ante*, § 286.

⁷ *Holmes v. Holmes*, 28 Vt. 765; *Dixon v. Dixon*, 18 Ohio R. 113.

sonal representative.¹ And in such case, as well as in all cases where the action accrues upon a contract made by or with him as such since the death of the testator or intestate, the action may be brought in the proper name of the executor or administrator, or as such:² whenever the money when recovered will be assets, the executor or administrator may sustain a suit in his representative capacity;³ and may join a count for conversion before the death, and one for damages after.⁴ He cannot, however, join counts on causes of action accruing to him in his private right as individual, with counts on causes of action in his representative capacity.⁵

When the amount recovered will be assets, the action is in his representative character.

The duty of the personal representative to prosecute or defend actions by or against the estate, is elsewhere discussed,⁶ as well as under what circumstances he may maintain actions concerning the real estate.⁷ But it may not be out of place to mention here that since a party to a judicial proceeding is bound thereby, or is entitled to the benefit thereof, only in the capacity in which he is before the court,⁸ it is often of vital importance to determine whether one who is an executor or administrator appears in his individual or representative character. In such cases it has been held that the insertion or omission of the word "as" before the representative title was decisive of the question,⁹ and that without it the word "administrator," "executor," etc., must be regarded merely as *descriptio personæ*.¹⁰ But it is now generally held that the title and pleadings may be considered together to ascertain the true nature of the action, and it will be treated as an individual or representative one as disclosed upon an inspection of the whole record.¹¹ So where

When designation of personal representative may be considered merely as *descriptio personæ*.

¹ *Ante*, § 293. See also § 200 on the necessity of an administrator; *Holbrook v. White*, 13 Wend. 591.

² *Kent v. Bothwell*, 152 Mass. 341, 342; *Ham v. Henderson*, 50 Cal. 367; *Patchen v. Wilson*, 4 Hill (N. Y.), 57; *Manwell v. Briggs*, 17 Vt. 176; *Haskell v. Bowen*, 44 Vt. 579; *White v. Pulley*, 27 Fed. Rep. 436, 440; *McDonald v. Williams*, 16 Ark. 36; *Yarborough v. Ward*, 34 Ark. 204, 208; *Carlisle v. Burley*, 3 Me. 250; *Trecothick v. Austin*, 4 Mas. 16, 34; *Catlin v. Underhill*, 4 McLean, 337; *Campbell v. Baldwin*, 6 Blackf. 364; *Ham v. Henderson*, 50 Cal. 367; in New Jersey the action must be brought in his own name: *Stewart v. Richey*, 17 N. J. L. 164.

³ *Boggs v. Bard*, 2 Rawle, 102; *Brown v. Lewis*, 9 R. I. 497; *Evans v. Gordon*, 8 Porter, 346; *Yarborough v. Ward*, 34 Ark. 204, 208.

⁴ *French v. Merrill*, 6 N. H. 465.

⁵ *French v. Merrill*, *supra*; *Epes v. Dudley*, 5 Rand. 437.

⁶ *Post*, § 324; also § 323.

⁷ *Ante*, § 293; *post*, §§ 337 *et seq.*

⁸ *Collins v. Hydorn*, 135 N. Y. 320; *Insley v. Shire*, 54 Kan. 793, 798; *State v. Branch*, 134 Mo. 592, 604; *Wood v. Curran*, 99 Cal. 137.

⁹ See *Lucas v. Pittman*, 94 Ala. 616.

¹⁰ *Lowery v. Daniel*, 98 Ala. 451. And a judgment pursuant to such a writ binds the administrator only individually, although the judgment be expressed to be against him "as adm'r": *Rich v. Sowles*, 64 Vt. 408.

¹¹ *First National Bank v. Shuler*, 153 N. Y. 163, 172; *Jennings v. Wright*, 54 Ga. 537; *Beers v. Shannon*, 73 N. Y. 292, 297.

an administrator has obtained judgment against a debtor of the estate, he may maintain an action on such judgment, in another State, in his individual capacity, and if he describes himself as administrator the term will be surplusage and disregarded as being simply a description of the person.¹

An executor or administrator cannot bind the estate by his contract although made in the interests of the estate, and he is personally liable thereon, though he describe himself by his representative title and assumes to contract as such.²

¹ *Ante*, § 162.

² *Post*, § 356, and cases there cited.

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